No. 87-1031-CFX
Status: GRANTED

Title: G. P. Reed, Petitioner
v.
United Transportation Union, et al.

Docketed:
December 16, 1987

Court: United States Court of Appeals
for the Fourth Circuit

See also:
87-42

Counsel for petitioner: Wallas,Jonathan, Gresham,John

Counsel for respondent: Miller III,Clinton J.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1987	G	Petition for writ of certiorari filed.
2	Jan 20 1988		DISTRIBUTED. February 19, 1988
3	Feb 2 1988	F	Response requested -- BRW, JPS.
4	Feb 9 1988		Brief of respondent United Transportation Union in opposition filed.
5	Feb 17 1988		REDISTRIBUTED. March 4, 1988
7	Feb 29 1988		REDISTRIBUTED. March 4, 1988
8	Mar 7 1988		Petition GRANTED.
			**********
10	Apr 8 1988		Order extending time to file brief of petitioner on the merits until May 6, 1988.
11	May 6 1988		Joint appendix filed.
12	May 6 1988		Brief amicus curiae of Associaion for Union Democracy and Public Citizen filed.
13	May 6 1988		Brief of petitioner G. P. Reed filed.
21	May 6 1988	X	Brief amicus curiae of United States filed.
14	May 19 1988		Record filed.
		*	Certified copy of original record and C.A. proceedings, 2 volumes, received.
16	May 24 1988		Order extending time to file brief of respondent on the merits until June 20, 1988.
17	Jun 20 1988		Brief amicus curiae of AFL-CIO filed.
18	Jun 20 1988		Brief of respondent United Transportation Union filed.
19	Jul 26 1988		CIRCULATED.
20	Aug 29 1988		Set for argument. Wednesday, November 2, 1988. (4th case) (1 hr).
22	Nov 2 1988		ARGUED.

87 1031

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the six-month limitation period of §10(b) of the National Labor Relations Act applies to a claim brought by a Union member under Title 1 of the Labor Management Reporting and Disclosure Act which does not implicate collective bargaining process but concerns only internal disruption of Union democracy.

PARTIES

The parties to this proceeding are G. P. Reed, the United Transportation Union, Fred H. Hardin, K. R. Moore, and J.L. McKinney.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes — Page

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, G. P. Reed, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Courts of Appeals for the Fourth Circuit entered in this proceeding on September 17, 1987.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 828 F.2d 1066, and is set out at pp. 48a - 70a of the Appendix. The District Court's Order denying Summary Judgment is reported at 633 F.Sup. 1516 and is set out in pertinent part at pp. 1a - 45a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This action involves rights protected by 29 U.S.C. §411 and is brought pursuant to 29 U.S.C. §412, which provides:

> Any person whose rights secured by the provisions of this subchapter have

been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

On August 2, 1985, Petitioner commenced this action in the United States District Court For the Western District of North Carolina. Plaintiff raised claims under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401 et. seq. ("LMRDA") as well as pendent state contract and quantum muruit claims. Specifically the Plaintiff claimed that the Respondents had violated his rights to freedom of speech and assembly as a Union member

as well as his right to be safeguarded from improper disciplinary action under Title 1 of the LMRDA, 29 U.S.C. §411. He claimed that the selective application of a "prior approval" policy to disallow his claims for services rendered to the Union were meant to punish him for speaking out against Local President Warlick, whose claims for reimbursement had not been paid under order of the international union despite his failure to obtain prior approval for his claims. The Petitioner also claimed the Respondents had not properly performed their fiduciary duties as officers of the Union in violation of Title V of the LMRDA, 29 U.S.C. §501.

The Respondent filed a Motion to Dismiss the Complaint or in the alternative for Summary Judgment.

The trial court heard the Motion on January 31, 1986, and subsequently entered an Order denying the Respondents' Motion with regard to the 29 U.S.C. §411 and the pendent state claims and dismissing Petitioners' claim pursuant to 29 U.S.C. §501. The trial court further indicated that an application for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) would stay all proceedings in that court. Therefore, the Respondents successfully petitioned for an Interlocutory Appeal. The Petitioner did not appeal from the dismissal of the 29 U.S.C. §501 claim.

The primary issue raised by the Respondent in the trial court and again in the Fourth Circuit was whether these courts were required to apply the six-month statute of limitations provided by 29 U.S.C.

§160(b) to a freestanding LMRDA "Bill of Rights" claim. While the trial court rejected this argument, the Court of Appeals reviewed the conflicting opinions of the other circuits which had reviewed the issue subsequent to this Court's decision in Delcostello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct 2281, 76 L.E.2d 476 (1983). Following this review, and without substantial analysis, the Court of Appeals adopted the reasoning in Steelworkers' Local 1397 v. United Steelworkers of America, 748 F.2d 180 (3rd Cir.)(1984). A timely Petition For Certiorari followed this decision.

REASONS FOR GRANTING THE WRIT

(1) Certiorari Should Be Granted To Resolve The Conflicts Between Decisions Of Courts Of Appeals With Regard To The Application Of A Six Month Statute Of Limitations To LMRDA Claims Pursuant To 42 U.S.C. §412.

To date six circuits have reviewed the issue of whether the Delcostello decision requires the imposition of the six month statute of limitations contained in 29 U.S.C. §160(b)(2) to claims arising under 29 U.S.C. §411 and brought under 29 U.S.C. §412. Four circuits apply the six-month limitations to LMRDA claims.[1] Two reject this approach after determining that Delcostello

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1 Lewis v. International Brotherhood of Teamsters, Local 771, (3rd Cir. 1987)(reaffirming Steelworkers' Local 1397 v. United Steel Workers of America, 748 F.2d 180 (3rd Cir. 1984)) Cliff v. United Auto Workers, 818 F.2d 623 (7th Cir.) Petition for Cert. filed, 87-42 (1987)(reaffirming Vallone v. Teamsters Local No. 705, International Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984)) Davis v. United Auto Workers, 765 F.2d 1510 (11th Cir.)(1985) Cert. Denied, ____ U.S. ____, 106 S.Court 1284 (89 L.Ed.2d 592)(1986); Adkins v. IBW, 769 F.2d 330, 335 (6th Cir. 1985).

neither compels nor suggests such a result.[2]

Only the decisions in Local 1397, supra and Doty, supra contain substantial analysis of Delcostello. The Local 1397 decision has provided the conceptual underpinning for the decisions which have applied the six-month limitation period rests on four basic propositions, each of which is convincingly repudiated in Doty. The Doty court's reasoning is set out in full as follows:

> The first was that a Title I action bears a "family resemblance" to an unfair labor practice charge: both are concerned with "arbitrary actions by unions", 748 F.2d at 183, and so there is thus no distinction between "internal" LMRDA concerns and "external" NLRB concerns. Id. This, we feel, is to stretch the

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2 Rodonich v. House Wreckers Union Local 95, 817 F.2d. 967 (2nd Cir. 1987); Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986).

rubric of "family" far beyond its sense in Delcostello, where the term was used to indicate a dramatic overlap of equivalency, situations in which a charge of unfair representation or breach of a collective bargaining agreement would "also amount to unfair labor practices". 462 U.S. at 170. 103 S.Ct. at 2293. The fact that because both the NLRA and the LMRDA endeavor to protect workers from unfair treatment, they must be deemed to bear a "family resemblance" is no more a unifying perception than the fact that both tort and contract law purport to protect against unreasonable actions.

A second, closely related proposition of the Local 1397 court was that its "family resemblance" perception was illustrated by the fact that plaintiffs' objective was to change the overall policies of the national union in bargaining with industry. Again, while true, the observation claims too much; it overlooks the fact that the Delcostello court did not overrule Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct 1107, 16 L.Ed.2d (1966), where, although a collective agreement was at issue, the

Court applied a six-year state contract limitations period because the "'consensual processes'" - "'the formation of the collective agreement and the private settlement of disputes under it'" were not implicated. 462 U.S. at 162-63, 103 S.Ct. at 2289. In short, the fact that some day, in some ways, a plaintiff's claim may affect collective bargaining falls far short of the nexus required to invoke "family resemblance" reasoning.

A third statement by the Local 1397 court is that there is a "similarity in policy consideration [between]...LMRDA suits and unfair labor practice charges" that dictates invocations of the same six-month section 10(b) limitations period. 748 F.2d at 183. The only reasoning supporting this conclusion is that "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's activities and effectiveness in the collective bargaining arena." Id. at 184. As to this ipse dixit, we can do no better than cite the Davis court, which, after

quoting this passage, observed, "This link appears rather tenuous in the situation of a single dispute between an individual union member and the union." 765 F.2d at 1514 n. 11.

Finally, and of less importance, the Local 1397 court added "as a final point" that a Title I LMRDA action would rarely be latent, since "rights are denied openly". 748 F.2d at 184. Leaving aside the obvious point that in the case at bar the allegations describe a non-open, non-obvious denial of membership, perceivable only gradually, perhaps a more salient point is that which we have noted in our main discussion, the solemnity of the union member's decision to attack the leadership and the possible benefit redounding to the membership and public at large.

784 F.2d 9-10.

As Justice White noted in dissenting to the denial of certiorari in Davis, supra, the explicit rejection in Doty of the analysis contained in Local Union 1397 indicates the need for a

resolution of the conflict by this Court. Now the conflict has deepened with the recent decision in Rodonich, supra there is even a greater need for the court to resolve the divergent Court of Appeals' decisions.

(2) Certiorari Should Be Granted Since Application A Of Six-Month Limitation Period Is Inconsistent With This Court's Holding In DelCostello.

With limited exception, federal statutes do not prescribe their own time limitations; rather, the limitations must be borrowed from other sources. This Court has repeatedly declared that, as a general rule, courts should apply the most closely analogous state statute of limitations. Wilson v. Garcia, 471 U.S. 261 (1985); Runyon v. McCrary, 427 U.S. 160, 180 (1976). The determination of which state

statute of limitations is to be borrowed can present a question of characterization, because federal statutes often create rights for which there is no close state parallel. The need for a court to make such a characterization, however, is not a sufficient reason to abandon the rule. Delcostello v. Teamsters, 462 U.S. 151, 171, (1983); Wilson v. Garcia, supra.

This Court has created a narrow exception to the general rule for cases in which the analogous state statutes would frustrate the implementation of national policies. Agency Holding Corp. v. Mallory-Duff ____ U.S. ____ (1987); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977). The "hybrid" action against a Union and an employer, which was discussed in Delcostello, is one such

exception. In order to understand why an exception was necessary in Delcostello, it is important to understand the precise role which "hybrid" actions play in federal labor law.

Prior to Delcostello, this Court had held that individual employees, as well as their unions, may sue under §301 of the LMRA to enforce rights conferred on them by collective bargaining agreements between their employers and their Union. Smith v. Evening News Ass'n., 371 U.S. 195, 200 (1962). But the Court had also erected a significant procedural barrier to prevent the courts from being inundated with suits to enforce collective bargaining agreements -- the requirement that contractual grievance procedures, including

arbitration, be exhausted before suit is filed. Republic Steel v. Maddox, 379 U.S. 650 (1965).

A major substantive barrier to such suits was also in place -- the requirement that courts give favorable review to arbitral awards, unless the award cannot possibly be justified as having drawn its essence from the collective bargaining agreement. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). This Court had also recognized, however, that employees may be prevented from exhausting the contractual procedures, or may be unable to obtain a fair hearing in arbitration. To protect the employees, the Court had placed a duty of fair representation on the Union regarding its conduct of contractual procedures and its

decision to terminate such procedures. Accordingly, the Court had ruled that individual employees seeking to enforce their rights under a collective bargaining agreement would be excused from the exhaustion requirement and from the highly deferential standard of review under Enterprise Wheel if they could demonstrate that the Union breached its duty of fair representation in handling the grievance. Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

The issue of the proper limitation period for duty of fair representation actions first reached this Court in UPS v. Mitchell, 451 U.S. 56 (1981). Mitchell presented the narrow question of which statute was most analogous for post-

arbitration actions against employers alone, and the Court decided that the most analogous statute was that for suits to vacate arbitration awards. Id. at 61-62. Moreover, the Court expressed concern that, absent a reasonably short limitations period, the parties to the collective bargaining agreement could not be sure that an arbitrator's resolution of a dispute under the agreement was in fact final. Thus, although state limitations periods for enforcing contractual rights provided another analogous alternative, those statutes allowed too long a period in which the arbitrator's disposition of a grievance was in question, and their use would frustrate federal policy favoring prompt resolution of labor-management disputes. Id. at 63-64.

Two years later Delcostello resolved whether a federal limitations period, rather than any of the state alternatives, applied in hybrid suits against both an employer and a Union. This Court reiterated its concern that several of the analogous state limitations periods, such as actions for tortious injury or for professional malpractice, were so lengthy that employer-union disputes, and the compromise by which they were resolved, could remain in limbo for years, and thus could endanger stability in labor relations and, in the long run, labor peace. 462 U.S. at 163-164, 168-169. The other most analogous state statutes, however, those applied to actions to vacate arbitration awards, were so short -- generally three months -- that they did not allow enough time for aggrieved employees to initiate

suits. Id. at 167-168. Moreover, the Court recognized that, if the most analogous state statute were applied to the employer (i.e., actions to vacate an arbitration) and to the Union (i.e., tort, malpractice or rights created by statute), the result would be application of different limitations periods to two parts of the same lawsuit, which would clearly have been undesirable. Id. at 169 n. 19.

Still, this Court noted, "these objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." Id. at 169. However, it found that §10(b) of the NLRA was more appropriate than any of the state analogies, both because it had been designed by Congress to accommodate a

"very similar balance of interests", i.e., employee rights versus the stability of private adjustment of labor disputes, and because the duty of fair representation was itself a cause of action implied from the NLRA. Id. at 169-171.

This Court was careful, however, to remind the lower courts that they should not too readily decline to adopt state limitations periods simply because a state fails to provide a perfect analogy: "We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. . . [R]esort to state law remains the norm for borrowing of limitation periods [unless] a rule from elsewhere in federal law clearly

provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of limitation make the rule a significantly more appropriate vehicle." Id. at 171-172 (emphasis added). Additionally, the Court in Delcostello specially affirmed its decision in Auto Worker v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), which had approved the use of borrowed state statute of limitations in straightforward action under §301 of the Labor Management Relations Act, 29 U.S.C. §185.

Subsequent to Delcostello, every Court of Appeals which has considered the proper limitations period for actions under §303 of the LMRA to enforce the secondary boycott provisions of the NLRB has elected not to apply the six-month period of §10(b). Monarch Long Beach Corp. v.

Teamsters Local 812, 762 F.2d 228, 231 (2d Cir. 1985); Carruthers Ready-Mix v. Cement Masons Local 520, 779 F.2d 320 (6th Cir. 1985). These courts have applied longer limitations periods even though labor-management relations are directly affected by such suits and a secondary boycott, like a breach of the duty of fair representation, is an unfair labor practice for which Congress expressly prescribed a six-month limitations period for filing charges with the NLRB. These courts concluded that the effect of such litigation on stable labor-management relations and on labor peace is insufficient to warrant a departure from the normal rule of borrowing analogous state limitations periods. Similarly, the limitations periods in employment discrimination cases have been borrowed from state law, Johnson

v. Railway Express Agency, 421 U.S. 454, 462 (1975), despite the fact that such actions frequently call into question matters which have been settled between Unions and employers. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The circuits have continued to apply state limitations periods in such cases under 42 U.S.C. §1981, citing Delcostello as authority. Howard v. Railway Express, 726 F.2d 1529, 1531 (11th Cir. 1984).

The only substantive area of labor law where a number of Courts of Appeals have failed to heed the Delcostello admonition -- that its holding was not to be taken as a departure from the prior practice of borrowing state limitations periods for federal labor law causes of action has been in cases involving LMRDA claims concerning violations of

rights granted to Union members under 29 U.S.C. 411.

Certiorari should be granted to further clarify to the Courts of Appeals that Delcostello does not constitute any departure from the Court's continued practice of borrowing appropriate state limitations periods for these LMRDA causes of action under 29 U.S.C. 412.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-85-477-P

G. P. REED, Plaintiff, v. UNITED TRANSPORTATION UNION, FRED A. HARDIN, K.R. MOORE, and J.L. McKINNEY, Defendant.	O R D E R (Filed April 1, 1986)

THIS MATTER was heard before the undersigned on January 31, 1986 in Charlotte, North Carolina on the Defendants' Motion to dismiss or for summary judgment. The Defendants were represented by Clinton J. Miller and J. David Jones, Attorneys at Law. The Plaintiff was represented by John W. Gresham, Attorney at Law.

The Plaintiff, G. P. Reed, is the Secretary/Treasurer of Local 1715 of the Defendant United Transportation Union, which is a labor organization within the meaning of 29 U.S.C. §401 et seq. In August 1982, Defendant Fred A. Hardin, President of the Union, sent Defendant J. L. McKinney, International Auditor of the Union, to Charlotte, North Carolina to audit the books and records of Local 1715. The audit was prompted by a letter to Defendant Hardin from a member of Local 1715 regarding his concerns about the financial stability and future of the Local. As a result of the audit, Defendant McKinney disallowed checks paid by the Local to the Plaintiff for "time lost" in the amount of $1,210.20.

The Plaintiff paid the amount disallowed, but appealed Defendant

McKinney's findings to Defendant Hardin by way of a letter dated September 6, 1982. The Plaintiff claimed that the repayment of the $1,210.20 was demanded on the ground that he was required to get approval for reimbursement for "time lost" to do various tasks before "losing" the time and doing the work. He further claimed that no such prior approval requirement had existed or been enforced before its application to him.

Defendant Hardin denied the Plaintiff's appeal in a letter dated October 1, 1982. Hardin explained that when a local officer is salaried, his regular salary is meant to cover the responsibilities of his office. He noted that the payments that were disallowed had been claimed for the performance of ordinary

duties and responsibilities of his office.

The Plaintiff subsequently sought to enforce the "prior approval" policy he claims had been applied to him when Local President Fred Warlick and another Local officer requested reimbursement for time spent on Local 1715 business for which the Local had not given prior approval. Defendant Hardin, however, ordered the Plaintiff to pay those claims.

On June 28, 1983, the Plaintiff met with Defendant K. R. Moore, Vice President of the Union, to determine whether the Union planned to continue to enforce dual policies with respect to expense payments by denying his appeal for reimbursement. The Plaintiff claims that Defendant Moore refused to discuss the matter.

On July 1, 1983, the Plaintiff's attorney wrote to Defendant Hardin complaining about the $1,210.20 repayment the Plaintiff was required to make to the Union after the audit as a result of the different standards allegedly applied to the Plaintiff and other Union members with regard to payment of Union expenses. He asserted that the heart of the conflict involved Local President Warlick's actions to harass the Plaintiff for not supporting his views, and that if the Union supported Warlick in those efforts, it would be in violation of 29 U.S.C. §411.

On July 22, 1983, Defendant Hardin responded to the Plaintiff's attorney, stating that the issue concerning the time disallowed as a result of the audit had been

considered closed once the Plaintiff had made his repayment to the Union.

On August 2, 1983, the Plaintiff's attorney sent Defendant Hardin another letter, in which he reported that he had advised the Plaintiff of Hardin's response concerning his request for reimbursement. He also informed Defendant Hardin that he had advised the Plaintiff "to commence litigation on or about September 15, 1983, unless the Union has properly reviewed and reconciled this matter." Letter dated August 2, 1983 from John Gresham, Esq. to Union President Hardin.

The Plaintiff filed this action on August 2, 1985, exactly two years after his attorney's last letter to Defendant Hardin. In his Complaint, the Plaintiff raises claims under the Labor-Management Reporting and

Disclosure Act, 29 U.S.C. §401 et seq. ("LMRDA") as well as pendent state implied contract and quantum meruit claims. Specifically, the Plaintiff claims that the Defendants have violated the Plaintiff's rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper disciplinary action under Title I of the LMRDA, 29 U.S.C. §411.[1] He

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[1] The relevant text of §411 provides:

> (2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> (5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. §411(a)(2), (a)(5).

claims that the selective application of the "prior approval" policy to disallow his claims was meant to punish him for speaking out against Local President Warlick, whose claims for reimbursement were not denied despite his failure to obtain prior approval for his "time lost." He also claims that the Defendants have not properly exercised their

fiduciary duties as officers of the Union pursuant to Title V of the LMRDA, 29 U.S.C. §501.[2]

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[2] The relevant text of §501 provides:

> (a) Duties of officers, exculpatory provisions and resolutions void. The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. §501(a).

Whether the Court may entertain the Plaintiff's claim under §411 of Title I of the LMRDA depends on whether that claim has been brought in a timely fashion. Because Congress has not explicitly provided a limitations period for such claims, the Court must "borrow" the most appropriate statute of limitations from some other source.

The last Fourth Circuit case to address the issue of what statute of limitations to apply to a claim under §411 of the LMRDA was Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978). In Howard, the Fourth Circuit noted that courts "have found that denial of free speech is similar to a personal injury under state law and have

applied tort limitations statutes to such claims." Id. at 774. Accordingly, the Court determined that Virginia's two-year statute of limitations for personal injury claims should apply to the Plaintiff's claim that his union had abridged his right of free speech guaranteed by Title I of the LMRDA.

Since Howard represents the Fourth Circuit's last word on the appropriate limitations period for actions brought under Title I of the LMRDA, the Plaintiff contends that this Court is bound to apply North Carolina's three-year statute of limitations for personal injury actions. The Defendant, on the other hand, relies on the Supreme Court's more recent opinion in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), and its progeny and argues that the Court

should apply the six-month limitations period of Section 10(b) of the National Labor Relations Act for unfair labor practices charges to the Plaintiff's LMRDA Title I claim.

The task before the Court in DelCostello was the selection of an appropriate statute of limitations for a "hybrid" action combining (1) a union member's claim against his employer under §301 of the Labor Management Relations Act for violation of a collective bargaining agreement, and (2) his claim against his union for breach of its implied duty of fair representation in its handling of his grievance against the employer. The Court stated at the outset of its opinion that it has "generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law" when

federal law fails to provide explicitly for a limitations period for a federal action. Id. at 158. The Court noted, however, that "[i]n some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." Id. at 172.

The Court proceeded to reject the state statutes of limitations suggested by the parties because they provided imprecise analogies to the claims in the hybrid action and failed to accommodate the policy considerations underlying the hybrid action. The Court found the usual ninety-day statute of limitations for the vacation of arbitration awards to

be too short to provide an employee with a "satisfactory opportunity to vindicate his rights under §301 and the fair representation doctrine." Id. at 166. On the other hand, the Court determined malpractice limitations periods, varying from three years to ten years, to be too long in light of the strong federal interest in speedy resolution of suits involving the grievance and arbitration procedures of a collective bargaining agreement. Id. at 168-69. The Court adopted instead the six-month limitations period of §10(b) of the National Labor Relations Act, "a federal statute of limitations actually designed to accommodate a balance of interests very similar to those at stake here--a statute that is, in fact, an analogy to the present lawsuit more

apt than any of the suggested state-law parallels." Id. at 169.

In deciding to apply §10(b)'s six-month period to the hybrid action, the Court first noted that a "substantial overlap" often exists between claims against a union for breach of its duty of fair representation, against an employer for breach of a collective bargaining agreement, and unfair labor practice charges. It found that "fair representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions--as are virtually all unfair labor practice charges made by workers against unions." Id. at 170. It further stated that "it may be the case that alleged violations by an employer of a collective bargaining agreement will also amount to unfair labor practices." Id.

Even more important to the Court in its decision to adopt §10(b)'s limitations period was the close similarity of the policy considerations relevant to the choice of a limitations period for unfair labor practice charges and for hybrid §301/fair representation actions. The Court observed:

> "In §10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to

> promote--the formation of the . . . . agreement and the private settlement of disputes under it.' Hoosier, 383 U.S. at 702. Accordingly, 'the need for uniformity' among procedures followed for similar claims, ibid., as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adaptation of §10(b) of the NLRA as the appropriate limitations period for [hybrid §301/fair representation lawsuits]."

Id. at 171 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring)).

The Supreme Court did not, however, intend to create an all-embracing new rule to be applied whenever an action involving a labor dispute lacks a congressionally enacted statute of limitations. The Court stressed that

> our holding today should not be taken as a departure from prior practice in

> borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. See, e.g., Mitchell, 451 U.S., at 61, n.3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.

DelCostello, 462 U.S. at 171.

Consistent with this cautionary language, the Supreme Court in DelCostello did not disturb its holding in Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), that the six-year state statute of limitations governing contracts should be applied to an action under a collective bargaining agreement brought by a union against an employer. The Court noted that in

Hoosier it had resisted the suggestion to establish a uniform federal period of limitations for such lawsuits despite its recognition that suits involving labor-management relations ordinarily call for uniform law. The DelCostello Court explained its decision in Hoosier by stating:

> [W]e reasoned that national uniformity is of less importance when the case does not involve "those consensual processes that federal labor law is chiefly designed to promote--the formation of the collective agreement and the private settlement of disputes under it," 383 U.S., at 702. We also relied heavily on the obvious and close analogy between this variety of §301 suit and an ordinary breach-of-contract case.

DelCostello, 462 U.S. at 163.

Since DelCostello, the circuits have split on the issue whether §10(b)'s six-month limitations period should be extended to a union member's LMRDA Title I claims against

his union. The Sixth and Seventh Circuits have determined in a conclusory fashion that the factors guiding the Supreme Court's choice of a limitations period for the hybrid action in DelCostello apply with equal force in the context of an LMRDA claim and, therefore, subjected the LMRDA claims before them to the same six-month limit. See Adkins v. Electrical Workers, 769 F.2d 330, 335 (6th Cir. 1985); Vallone v. Local Union No. 705, International Brotherhood of Teamsters, 755 F.2d 520, 521-22 (7th Cir. 1984).

The Third Circuit reached the same conclusion after a more detailed analysis in Local Union 1397 v. United Steelworkers, 748 F.2d 180 (3rd Cir. 1984). Following the analysis used in DelCostello, the Court first found that Title I of the LMRDA and the NLRA provisions

governing unfair labor practices bear a "family resemblance" since they "are both addressed to the same basic concern: the protection of individual workers from arbitrary actions by unions . . . ." Id. at 183.

It was the perceived similarity in policy considerations underlying the choice of a limitations period for LMRDA claims and unfair labor practice charges, however, that convinced the Third Circuit to apply §10(b)'s six-month period. The Court found that, while a union member needs sufficient time to vindicate his rights under the LMRDA, "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's activities and effectiveness

in the collective bargaining arena." Id. at 184.

As a final point, the Third Circuit expressed its opinion that a six-month limitations period for LMRDA claims would not be inherently unfair to union members. It noted that LMRDA Title I violations are rarely latent, and thus the aggrieved union member should be able to decide whether to sue within six months of the time the cause of action arises. The Court believed in essence that if the Supreme Court thought six months was enougn time for filing a §301 claim, the imposition of a six-month limit for filing an LMRDA claim would likewise be fair. Id.

Although ultimately adopting the result reached by the Third Circuit in Local Union 1397, the Eleventh Circuit in Davis v. United Automobile Aerospace, and Agriculture Implement

Workers, 765 F.2d 1510 (11th Cir. 1985), cert. denied, ___U.S.___ (1986), revealed certain weaknesses in the Third Circuit's reasoning. With regard to the adequacy of a six-month period for filing an LMRDA Title I claim, the Eleventh Circuit noted a potential practical problem that could preclude the aggrieved union member from perfecting his LMRDA claim. The Court explained:

> A cause of action under Section 411 accrues when the plaintiff union member discovers, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged violations, at which time the statute of limitations begins to run. However, section 411(a)(4) provides that a union member may be required to exhaust reasonable internal union procedures for up to four months before proceeding with a suit under section 412. Thus, union members might be forced into a "Catch-22" situation in which they could be barred from suing the union if

> they wait to sue for more than six months while exhausting union remedies, but could be dismissed from federal court for failure to exhaust internal remedies if they file suit within the limitations period without seeking to exhaust.

Id. at 1515 n.13.

More significant to the issue whether the reasoning of DelCostello compels application of §10(b)'s limitations period to LMRDA Title I claims is the Court's rejection of the Third Circuit's conclusion that rapid resolution of a union member's LMRDA grievance against his union is necessary to maintain the federal goal of stable bargaining relationships. The Court found that the link between dissension within a union and the union's effectiveness in the collective bargaining arena "appears rather tenuous in the situation of a single dispute between

an individual union member and the union." Id. at 1514 n.11. Indeed, the Court flatly disagreed with the Third Circuit's appraisal that the same policy considerations underlying the choice of a statute of limitations for unfair labor practices are present in an LMRDA Title I suit. The Court stated:

> [W]e note an important distinction between the present action and a hybrid §301/fair representation claim as was alleged in DelCostello.
>
> . . . .
>
> The present action, alleging a violation of statutorily-protected free speech, involves a different balance of interests [than did the hybrid action in DelCostello]. First, an action alleging a violation of 29 U.S.C. §411 is brought only against the union; the employer is not involved. Therefore, the national interests in stable labor-management bargaining relationships and the speedy, final resolution of disputes

> under a collective bargaining agreement are not implicated. Accordingly, the need for national uniformity in the application of limitation periods to such an action is not as great. See DelCostello, 108 S.Ct 15 2289; Auto Workers v. Hoosier Corp., 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). Furthermore, a union member's interest in protection against the infringement of his rights of free speech rises to a national interest, as embodied in section 101(a)(2) of the LMRDA, 29 U.S.C. §411(a)(2), and thus seems of greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement.

Id. at 1514 (footnote omitted).

Despite its recognition of these policy arguments against extending §10(b)'s six-month limitations period to LMRDA Title I claims, the Eleventh Circuit felt "constrained by the rationale of DelCostello and the holdings of our sister circuits to

reach the same conclusion in the present case." Id. The Court stated that it felt bound by the fact that the Supreme Court had found a strong connection between the national interest in labor peace and the necessity for a short time period in which to bring an action based on a labor union's implied duty of fair representation to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members under Title I of the LMRDA. Id.

It is true that the Supreme Court in DelCostello identified the federal policy in favor of "relatively rapid final resolution of labor disputes" as a reason for rejecting the suggested three- to nine-year malpractice statute of limitations for the fair representation claim against the

union. DelCostello, 462 U.S. at 168. This Court notes, however, that what the Supreme Court may consider "relatively rapid" in one type of labor dispute may be different from what may satisfy that policy in another context. In DelCostello, the Court mentioned the "rapid resolution" policy in the context of its discussion of the need for speedy and final resolution of disputes that may involve the interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union. Id. at 169. In Auto Workers v. Hoosier, supra, however, the Court specifically found that the federal goal of "relatively rapid disposition of labor disputes" suggested by §10(b)'s six month provision would be satisfied by application of a six-year statute of

limitations in the context of a §301 action by a union against an employer for a straightforward breach of a collective bargaining agreement. Hoosier, 383 U.S. at 707. In any event, this Court does not agree with the Eleventh Circuit's sudden conclusion that the Supreme Court's concern over the speedy resolution of the fair representation claim in DelCostello automatically mandates as speedy a resolution when the suit is based on a dispute under Title I of the LMRDA.

The First Circuit recently issued a thorough and well reasoned opinion in Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986), in which it refused to follow its sister circuits in their extension of the result in DelCostello to actions brought solely against a union for a violation of Title I of the LMRDA. After

examining the reasoning and cautionary language of DelCostello, the Court "dr[e]w the clear conclusion that DelCostello is not the kind of precedent that lends itself as a springboard for easy application to other rights, statutes and policies. Rather, it is a closely reasoned exception to a general rule which illumines a rather narrow path." Id. at 6. It further stated that its

> Own scrutiny of the interests and policies at stake in this [LMRDA Title I] case convinces us that they so differ from those in DelCostello that its underlying approach mandates adherence in this case to the normal mode of applying "the most closely analogous statute of limitations under state law." 462 U.S. at 158.

Id. at 2.

Specifically, the First Circuit found from the legislative history of the LMRDA that Title I, which has

designated a "bill of rights" akin to that in our federal constitution, was enacted to protect a union member's civil and political rights as opposed to his economic rights. Thus, whereas the labor-management relationship is the core of the NLRA and the hybrid §301/fair representation claim, the individual's interest in internal union democracy is at the heart of Title I of the LMRDA. The Court drew from the legislative history "the sense that claims under Title I's bill of rights provisions were viewed primarily as civil rights matters rather than as labor matters." Id. at 8. It, therefore, believed that deriving a statute of limitations for pure Title I LMRDA claims from a state statute governing civil rights actions would be more logical than borrowing one from an unfair labor

practices statute. Accord McQueen v. MaGuire, No. 82 CIV. 8445 (PNL), Slip Op. (S.D.N.Y. March 11, 1986); Bernard v. Delivery Drivers, 587 F.Supp. 524 (D.Colo. 1984).

Like the Eleventh Circuit, the First Circuit also determined that an LMRDA bill of rights claim does not implicate the same underlying policy concerns found in DelCostello. Such a claim cannot be asserted against an employer; does not challenge the stable bargaining relationship between the union and the employer; and does not affect the interpretation of a collective bargaining agreement. In addition, when a union member is suing only for breach of his "civil rights" under Title I of the LMRDA, there is no attack on a private settlement under a collective bargaining agreement. The Court thus concluded that "the

interests served by a rather short statute of limitations in DelCostello, stable labor-management relationships and finality in privately grieved and arbitrated settlements, are virtually, if not entirely, absent in the case at bar." Id. at 7.

In contrast, the Court found that the interest of the union member is "qualitatively enhanced" in an LMRDA Title I case. The rights asserted in a Title I case were created by Congress in a specific statute modeled after the federal Bill of Rights. Id. at 7; see also United Steelworkers v. Sadlowski, 457 U.S. 102, 108-111 (1982). Thus, the union member's interest represents a national policy. The Court noted that there are no such specifically identified rights in a hybrid claim. Furthermore, the Court found that the

objective of Title I is to increase union democracy, whereas the objective sought in the typical hybrid case is a purely personal victory in the form of restoration of job, pay, or promotion." Id. at 9. The Court concluded that the "sorts of interests protected by the LMRDA make it inappropriate to limit suits under that act without a compelling reason." Id. at 9. Accord McQueen v. Maguire, No. 82 Civ. 8445 (PNL), Slip Op. (S.D.N.Y. March 11, 1986) ("a very short limitations period [for LMRDA bill of rights claims] would be justified only in the face of an overwhelming national interest in speedy resolution of the suit"); Rodonich v. House Wreckers Union Local 95, 624 F.Supp. 678, 682 (S.D.N.Y. 1985) ("Although the rapid resolution of labor disputes serves an important national policy, its

urgency is not so great when the result of applying the six-month statute might be to thwart the Congressional purpose in enacting the LMRDA, which was to provide union members with a 'bill of rights.'"); Rector v. Local Union No. 10, Civil No. 4-85-1142, Slip Op. at 11, 12 (D.Md. October 31, 1985) ("The importance of [a union member's "bill of rights"] in our legal system should lead us to give union members every opportunity to vindicate those rights, instead of searching out a short period of limitations . . . . Federal labor law should not be procedurally determined to resolve LMRDA claims quickly in a vain attempt to protect unions from diversity. Congress had precisely the opposite intent in mind when it wrote the LMRDA.")

The Second Circuit's interpretation of the reach of DelCostello also advises against adopting §10(b)'s six-month limitations period for LMRDA Title I claims. While arguing that DelCostello need not be narrowly construed to apply only to claims identical to those in DelCostello, the Second Circuit in Robinson v. Pan American World Airways, Inc. 777 F.2d 84 (2d Cir. 1985), adhered to its earlier view expressed in Monarch Long Beach Corp. v. Soft Drink Workers Local 812, 762 F.2d 228 (2d Cir. 1985), cert. denied, ____U.S.___, 106 S.Ct. 569 (1986), that DelCostello is inapplicable to actions which do not involve an immediate and direct impact on labor-management relations. It stated that in determining whether DelCostello should be applied in a labor-related

matter, "the key question is whether the dispute arises out of a labor-management relationship in which uniform and speedy settlement is highly desirable." Id. at 89.

Obviously, a union member's LMRDA Title I claim does not arise out of a labor-management relationship, but rather out of the union member's relationship with his union. It impacts only tangentially, if at all, on the union's bargaining relationship with the employer. Further, the Supreme Court noted in DelCostello that national uniformity is of less importance when the case does not involve "'those consensual processes that federal labor law is chiefly designed to promote--the formation of the collective bargaining agreement and the private settlement of disputes under it.'" DelCostello, supra, 462 U.S. at 1621-

163 (quoting Hoosier, 383 U.S. at 702. A Title I LMRDA suit such as the one presently before this Court does not implicate "those consensual processes," so application of a uniform federal limitations period is not as crucial a concern as it was in DelCostello.

The Court further believes that the Eleventh and First Circuits have aptly demonstrated that LMRDA Title I actions do not involve the same policy considerations that compelled the Court to adopt a rather short limitations period in DelCostello. Finally, the Court agrees with the First Circuit that an LMRDA Title I claim more closely resembles a civil rights claim than an unfair labor practice charge and that it is, therefore, more appropriate to borrow a statute of limitations applicable to a civil rights action than one

that governs unfair labor practice charges.

Thus, having reviewed the precedents from other circuits on the propriety of extending DelCostello to actions based on a union member's LMRDA Title I claim against his union, the Court is of the opinion that the sounder position is to decline to apply §10(b)'s six-month limitations period to the Plaintiff's LMRDA Title I claim. Instead, the Court will apply North Carolina's three-year limitations period for personal injury actions under N.C.Gen.Stat. §1-52 since that statute would apply to a federal civil rights action. See Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938 (1985) (state statutes of limitations for personal injury actions should apply to federal civil rights actions). This result is in accord

with the Fourth Circuit's pre-DelCostello disposition of the LMRDA statute of limitations problem in Howard v. Aluminum Workers International Union and Local, 589 F.2d 771, 774 (4th Cir. 1978). Thus, the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, since he filed it within three years of the time the cause of action arose.

Because the circuits are divided on this statute of limitations issue, however, the Court recognizes that there is substantial ground for difference of opinion with its ruling on the timeliness of the Plaintiff's LMRDA Title I claim. Since the resolution of the limitations issues involves a controlling question of law which could dispose of the Plaintiff's LMRDA Title I claim, an immediate appeal may materially

advance the ultimate termination of the litigation of that claim. Therefore, the Defendants are entitled to apply to the Fourth Circuit Court of Appeals for an interlocutory appeal of this ruling within ten days of the entry of this Order pursuant to 28 U.S.C. §1292(b).

Since the Court has determined that the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, it must consider the Defendants' alternative argument that the claim should be dismissed because the Plaintiff failed to exhaust his internal union remedies pursuant to 29 U.S.C. §411(a)(4).[3] The

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[3] 29 U.S.C. §411(a)(4) provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . . Provided, that any such member be required to exhaust reasonable hearing procedures (but not to

Defendants argue that President Hardin's unfavorable response to the Plaintiff's request for reimbursement could have been appealed to the Board of Directors of the Union pursuant to Article 75, II of the Union Constitution if the Plaintiff had not procrastinated in asserting his claims. That article of the Union Constitution provides:

> A member or subordinate body may appeal to the Board of Directors from any interpretation of this Constitution made by the International President, provided such appeal is filed with the GEneral Secretary and Treasurer within ninety (90) days from the date the decision by the International President was made.

UTU Constitution, Article 75, II.

> exceed a four-month lapse of time) within such organization, before instituting legal . . . proceedings against such organizations or any officer thereof . . . .

The Plaintiff contends that Article 75, II does not apply in this case since it covers only appeals from the President's interpretation of the Union's Constitution. The Plaintiff has never sought an interpretation of the Constitution from President Hardin. Since the claim involves matters of internal regulation and not matters of constitutional interpretation, the Court finds that the Plaintiff did not have a right to appeal President Hardin's decision under the provision cited by the Defendants. As the Defendants have shown the Court no other internal remedies that were available to the Plaintiff, there appears to be no valid basis of their argument for dismissal because of failure to exhaust union remedies.

[The remaining portion of the Order discusses Plaintiff's claim

under 29 U.S.C. §501. The Court dismissed this claim. Petitioner did not appeal the dismissal.]

NOW, THEREFORE, IT IS ORDERED that:

(1) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. §411 is DENIED;

(2) Because the Court is satisfied that its ruling on the timeliness of the Plaintiff's claim under 29 U.S.C. §411 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may advance the ultimate termination of the litigation, the Defendants may apply to the United States Court of Appeals for the Fourth Circuit within

ten (10) days of the date this Order is filed for permission to appeal this ruling pursuant to 28 U.S.C. §1292(b);

(3) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. §501 is GRANTED;

(4) The Defendants' Motion to dismiss the Plaintiff's state law claims is DENIED; and

(5) Should the Defendants apply for an interlocutory appeal pursuant to 28 U.S.C. §1292(b), that application shall stay all proceedings in this Court.

This the 30th day of April, 1986.

ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED DISTRICT COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 86-8112

UNITED TRANSPORTATION UNION, FRED A. HARDIN, K.R. MOORE, and J.L. McKINNEY,

Petitioners,

v.

G. P. REED,

Respondent.

ORDER

UPON consideration of the petition of United Transportation Union, Fred A. Hardin, K. R. Moore and J. L. McKinney, for permission to appeal and the answer to the petition,

IT IS ORDERED that the petition for permission to appeal is granted.

Entered at the direction of Judge Murnaghan, with the concurrences of Judge Russell and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK

G. P. REED, Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION; FRED A. HARDIN; K. R. MOORE; J. L. MCKINNEY, Defendants-Appellants.

No. 86-2564

United States Court of Appeals, Fourth Circuit.

Argued January 7, 1987.

Decided September 17, 1987.

Clinton Joseph Miller, III, Assistant General Counsel, United Transportation Union, Washington, D.C. (J. David James, Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, N.C., on brief), for Appellants.

John West Gresham (Ferguson, Stein, Watt, Wallas & Adkins, P.A., Charlotte, N.C., on brief) for Appellee.

RUSSELL, WIDENER and CHAPMAN Circuit Court Judges:

DONALD RUSSELL, Circuit Judge:

This is an interlocutory appeal brought pursuant to 28 U.S.C. §1292(b). The sole issue before the court is whether the six-month limitations period provided in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1982) ("NLRA") applies to a claim brought under Title I of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §411 (1982) ("LMRDA"), or whether the most analogous state statute of limitations is applicable. The authoritative decision on the point in issue is Del Costello v. Internat'l Brotherhood of Teamsters, 462 U.S. 151 (1983). However, different constructions of that decision have been adopted by the Courts of Appeals. The view on the application of DelCostello have been well stated in two decisions, one by the Third Circuit in Local Union 1397

v. United Steel Workers, 748 F.2d 180 (3d Cir. 1984), the other by the First Circuit in Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986). We find the Third Circuit view more persuasive and follow it in holding that the six-month limitations period of Section 10(b) applies to claims brought under Section 411 of the LMRDA, and reverse the decision of the district court below, which adopted the view of the First Circuit.

The plaintiff, G.P. Reed, is a member of the United Transportation Union ("UTU") and a Secretary-Treasurer of its Local 1715. In August 1982 defendant Fred Hardin, UTU President, had the books and records of Local 1715 audited after concerns arose about the financial stability of the Local. The auditor disallowed reimbursement

checks paid by the Local to Reed in the sum of $1,210.00 because Reed had failed to obtain prior approval for the reimbursements. Reed's counsel wrote to President Hardin on July 1, 1983, seeking repayment of the sum on the ground that different standards were applied to Reed than to other UTU members. He asserted that Local President Warlick ordered the disallowance of the reimbursement checks to harass the plaintiff for not supporting his views, and that if the UTU supported Warlick in those efforts, it would be in violation of Section 411 of the LMRDA. When Hardin responded that he considered the matter closed, Reed's counsel informed Hardin, by letter dated August 2, 1983, that he was advising Reed to commence litigation against the UTU under 29 U.S.C. §411 for violating Reed's equal rights and

privileges as a UTU member. Reed commenced this action in August 1985, two years after his attorney's last letter to defendant Hardin.

In his Complaint, Reed raised claims under the LMRDA as well as pendent state implied contract and quantum merit claims. Specifically, Reed claimed that the defendants had violated his rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper disciplinary action. He claimed that the selective application of the "prior approval" policy to disallow his reimbursement claims was meant to punish him for speaking out against Local President Warlick, whose claims for reimbursement were not denied despite his failure to obtain prior approval. He also claimed that the defendants had not properly exercised

their fiduciary duties as officers of the Union pursuant to Title V of the LMRDA, 29 U.S.C. §501.

The defendants moved for summary judgment on the grounds that (a) Reed failed to commence the action within the six-month statute of limitations period provided in Section 10 (b) of the NLRA, (b) Reed failed to exhaust his union remedies, (c) Reed's Section 501 claim failed to state a claim upon which relief could be granted, and (d) Reed's state law claims were barred as preempted by the LMRDA. The district court, by Order dated May 1, 1986, denied the defendants' motion as to all but Reed's Section 501 claim which it dismissed. The court, noting a split in the circuits concerning the statute of limitations applicable to Section 411 claims and that an immediate appeal from the

Order might materially advance the ultimate termination of the litigation, certified an appeal of its Order with respect to the limitations issue pursuant to 28 U.S.C. §1292(b). The defendants appealed on that issue within ten days of the court's Order, and we agreed to hear the interlocutory appeal.

The only question before the court is whether the six-month limitations period provided in Section 10(b) of the NLRA applies to claims brought under Section 411 of the LMRDA. In DelCostello v. Internat'l Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court determined what statute of limitations applies in an employee's "hybrid" suit against his employer, under Section 301 of the LMRA, and against his union, under the NLRA,

when he alleges the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. The Court began with the accepted proposition that because Congress did not specifically provide statute of limitations applicable to all federal labor claims, courts must often "'borrow' the most suitable statute or other rule of timeliness from some other source." Id., at 158. It then reiterated the general rule that courts should apply to such claims the most closely analogous statue of limitations provided under state law. Id. The Court noted, however, that it has not hesitated to use timeliness rules drawn from federal law rather than state law when application of the most analogous state rule might unduly

hinder or frustrate the federal policy behind the substantive federal law. See e.g. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (declining to apply state statutes of limitations to enforcement suits brought by the EEOC under Title VII of the 1964 Civil Rights Act); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (applying federal limitations provision of the Jones Act to a seaworthiness action under general admiralty law); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (refusing to apply a state statute of limitations to a federal action lying only in equity).

The Court analyzed the "hybrid §301/fair representation" claims brought by the plaintiffs and found that Section 10(b) of the NLRA, which establishes a six-month period for making charges of unfair labor

practices to the NLRB, should be applied to the hybrid claim because it was more analogous to the claim than were the suggested state-law parallels. In a careful analysis, the Court explained that the suggested state parallels, i.e., breach of contract suits, suits for vacation of arbitration awards and malpractice suits, failed to adequately balance the opposing interests of the employee in vindicating his rights and the federal interest in the rapid settlement of labor disputes. Id. at 164-69. The Court recognized a "family resemblance" between fair representation claims and unfair labor practice claims against unions:

> Many fair representation claims. . . include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under §8(b)(1) or (2). Aside from these clear cases, duty of fair representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions--as are virtually all unfair labor practice charges made by workers against unions.

Id. at 170 (emphasis added).

More important, the Court stressed the "close similarity" in policy considerations relevant to the choice of a limitations period for both the hybrid action and unfair labor practice action. Id., at 171. It found that "'the national interests in stable bargaining relationships and finality of private settlements,'" which necessitate a prompt resolution of labor related disputes, and "'an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system,'"

are considerations in both actions. Id., at 171 quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 70 (1981). Finding that the application of the proposed state limitations period would frustrate federal interests, and that Congress adopted Section 10(b) with the competing interests of the government and employee in mind, the Court adopted the Section 10(b) limitations period for "hybrid 301/fair representation" actions. The Court emphasized, however, that its decision should not be taken as a departure from the general rule favoring the adoption of analogous state limitations periods.

Although DelCostello did not address the issue before this court, several circuits have applied the analysis of DelCostello to a LMRDA Section 411 claim, but with

conflicting results. The majority of circuits considering the question have found Section 10(b) to be the most appropriate statute of limitations for Section 411 claims. See Davis v. United Auto Workers, 765 F.2d 1510 (11th Cir. 1985), cert. denied, ____ U.S. ____ (1986) (following Steelworkers' Local 1397 v. USWA, 748 F.2d 180 (3d Cir. 1984)); Adkins v. IBEW, 769 F.2d 330, 335 (6th Cir. 1985) (following Local 1397); Vallone v. Local Union No. 705, Internat'l Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984); Steelworkers' Local 1397 v. USWA, 748 F.2d 180 (3d Cir. 1984); Linder v. Berge, 739 F.2d 686 (1st Cir. 1984) (concerning a Section 414 claim). The most thorough analysis in support of this view was given by the Third Circuit in Local 1397. In that case, the court found that

Section 411 actions, like the fair representation action considered in DelCostello, bear a "family resemblance" to unfair labor practice charges. The court stated:

> As in DelCostello, an analogy between unfair labor practice charges and section [411] suits exists not only in practice, but more importantly in the considerations that underlie the choice of a limitations period in the federal labor law field. Further, we believe that a six-month, rather than a longer limitations period, is fair to all parties given the practicalities of most litigation under the LMRDA.

Despite appellants' protestations to the contrary, suits brought under section [411] do bear a "family resemblance" to unfair labor practice charges. Cf. DelCostello, 103 S.Ct. at 2293 (finding a "family resemblance" between unfair labor practice charges and breach of the duty of fair representation claims). Both section 8(b)(1) of the NLRA and section [411] are addressed to the same basic concern: the protection of

individual workers from arbitrary action by unions, which have been appointed the exclusive representatives of such individuals in the workplace. Appellants' attempted distinction between the "internal" concerns of the LMRDA and the "external" concerns of section 8(b) of the NLRA is thus flawed. In our scheme of labor relations, a union has but one function: the representation of individual workers in collective bargaining with their employer. Whether an individual's dispute with his union concerns an "internal" matter, such as freedom to speak against union leadership, or an "external" matter, such as the processing of grievances, every dispute implicates the responsibility that a union has for the economic welfare of its members.

Id., at 183 (footnotes omitted).

Noting an argument similar to the one advanced by the plaintiffs and the district court below that Section 411 claims are analogous to civil rights claims, the court stated

that "the purpose and operation of such rights cannot be divorced from general principles governing our federal labor policy" and that "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union materially affects the union's activities and effectiveness in the collective bargaining arena." Id., at 183-84. It, therefore, applied the Section 10(b) limitations period to the Section 411 claim.

The First Circuit, in Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986), declined to apply Section 10(b) to a Section 411 action, applying instead what it believed to be a more analogous state civil rights statute of limitations. In that case the plaintiff alleged that two local unions denied him full and

equal rights of membership. The court found that the plaintiff's claim was essentially an assertion of his "civil rights" and that under the reasoning in DelCostello, the court should apply the state limitations provision applicable to civil rights claim which it believed to be more analogous than Section 10(b). The court also found that because the plaintiff's claim involved only an internal dispute, it in no way challenged the stability of the relationship between the union and employer, and hence did not affect federal labor policy. Significantly, the court emphasized that in neither Local 1397 nor in Davis was there "an analogous state statute with anywhere near the aptness and closeness of fit of the Massachusetts civil rights statute in this case." Doty, 784 F.2d at 9. The court thus

differentiated the case before it from Local 1397 and Davis, stating that it was not in direct conflict with those decisions. It distinguished Vallone, Adkins and its own previous decision in Linder as having involved hybrid claims.

A few district courts have applied reasoning similar to the analysis in Doty and have declined to apply Section 10(b) to Section 411 actions when a more analogous state statute was available. Within our own circuit Rector v. Elevator Constructors, 625 F. Supp. 174 (D. Md. 1985), was such a case. In the case sub judice, the district court, on the urging of the plaintiff, declined to adopt the reasoning of the Third Circuit in Local 1397, but instead, it followed the reasoning of the First Circuit. The court found that Reed's interest in "union

democracy" outweighed any federal interest in the rapid resolution of internal union disputes because such disputes do not affect labor-management relations. The court also noted that in our pre-DelCostello decision in Howard v. Aluminum Workers Internat'l Union and Local, 589 F.2d 771 (4th Cir. 1978), we applied a state tort limitations statute to a union member's Section 411 claim against a union for allegedly violating his right of free speech. The district court, therefore, opted to apply North Carolina's three-year limitations period for personal injury actions to Reed's Section 411 claim against the defendants.

We believe that the district court erred in applying the state limitations period rather than the six-month limitations period of

Section 10(b). We find that the Third Circuit's analysis in Local 1397 is the correct one and we adopt that analysis for claims brought under Section 411. As explained by the Third Circuit, the plaintiff's claims, though they be akin to civil rights claims, cannot be divorced from the federal labor policy favoring stable labor-management relations. Indeed, Congress enacted the LMRDA "to eliminate or prevent improper practices on the part of labor organizations, employers, labor consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act," a fundamental tool of federal labor policy. 29 U.S.C. §402(c). Internal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly

cause a disaffection with the union, thus weakening the union and its ability to bargain for its members. Such prolonged disputes may also distract union officials from their sole purpose--representation of union members in their relations with their employer. These probable effects of protracted disputes may be destablizing to labor-management relations. Extended limitations periods for bringing Section 411 claims, therefore, may frustrate federal labor policy.

Although well aware of the Supreme Court's caution in DelCostello against an unjustified departure from the general rule favoring the application of analogous state limitations periods, we believe that since Section 411 claims bear a "family resemblance" to unfair labor practice charges and a lengthy

limitations period would frustrate the federal policy favoring rapid resolution of labor-related disputes, the rationale of DelCostello constrains us to apply the Section 10(b) limitations period which balances the interests of the government and employer, to Section 411 claims.

Reed has asked that we not apply our holding retroactively to his case because our decision constitutes a departure from our prior decision in Howard where we stated that "federal courts considering suits brought under the [LMRDA] must apply the most analogous state limitations period. Id., 589 F.2d at 774.

In an en banc decision in Zemonick v. Consolidation Coal Co., 796 F.2d 1546, 1547 (4th Cir. 1986), cert. denied, 107 S.Ct. 671 (1986),

we held that DelCostello was to be applied retroactively. We reaffirmed this holding in Triplett v. Brotherhood of Ry. Airline and S.S. Clerks, 801 F.2d 700, 702-03 (4th Cir. 1986), and the district courts of this Circuit have recognized the retroactivity of DelCostello as decided in Zemonick and dismissed actions for failure to meet the deadline established in that decision. Meadows v. Eaton Corp., 642 F.Supp. 284, 287 (W.D.Va. 1986). Any claim that Del Costello is not retroactive in this Circuit is foreclosed by our decision in Zemonick.

The decision of the district court is accordingly reversed and the cause is remanded to the district court for the entry of an order in conformity with this opinion. REVERSED and REMANDED WITH INSTRUCTIONS.

(2)

No. 87-1031

In The

Supreme Court of the United States

October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
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(216) 228-9400

Counsel for Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to review the decision of the Court of Appeals that applied the six-month limitations period from *DelCostello v. Teamsters,* covering actions for breach of a union's duty of fair representation, to a Labor Management Reporting and Disclosure Act (LMRDA) Bill of Rights claim where undisputed facts indicate potential effects of internal union strife upon the stability of collective bargaining?

PARTIES

The parties to this proceeding are: G. P. Reed; the United Transportation Union, its International President Fred A. Hardin, one of its Vice Presidents Kenneth R. Moore, and one of its International Auditors J. L. McKinney (all named in their official capacities).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 87-1031

—o—

In The
Supreme Court of the United States
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—o—

G. P. REED,
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Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

The Respondents, United Transportation Union, its International President Fred A. Hardin, one of its International Vice Presidents K. R. Moore, and one of its International Auditors J. L. McKinney, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Fourth Circuit rendered September 17, 1987, reported at 828 F.2d 1066, reversing on

interlocutory appeal the decision and judgment of the United States District Court for the Western District of North Carolina rendered May 1, 1986, reported at 633 F.Supp. 1516.

—o—

COUNTERSTATEMENT OF CASE

Proceedings Below:

Petitioner G. P. Reed, a member in good standing of the Respondent United Transportation Union (hereinafter, "UTU") and a Secretary-Treasurer of its Local 1715, filed this action on or about August 2, 1985, primarily seeking relief under Section 101 of the Labor-Management Reporting and Disclosure Act (hereinafter, "LMRDA") (29 U.S.C. 411) for violation of his "Bill of Rights" in the UTU's requirement, after audit, that he repay approximately $1,200.00 to the Local that he had previously reimbursed himself. The complaint also contained pendent state law claims sounding in quantum meruit and allegations concerning breach of the fiduciary obligations by UTU officers with respect to their duties under Title V of LMRDA.

After UTU (and its officers specifically named in the complaint, to wit, its President, F. A. Hardin, one of its Vice Presidents, K. R. Moore, and one of its International Auditors, J. L. McKinney), moved for summary judgment on the grounds, *inter alia,* that Reed had filed his action outside the applicable six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act (hereinafter, "NLRA") (49 U.S.C. 160(b)), the parties submitted affidavits in support of their respective positions as well as legal memoranda.

After hearing oral argument on January 31, 1986, the district court on April 30, 1986, (filed May 1, 1986) entered its order wherein it determined that the claims under LMRDA "Bill of Rights" and the pendent state law claims related thereto were not subject to the six-month statute of limitations contained in 29 U.S.C. 160(b). (Pet. App. at 1a-45a).[1] The Court further found that Reed had not sufficiently complied with Title V of LMRDA to raise any issue with respect to the fiduciary obligation of UTU or its officers. (*Id.*) The district court in its order noted the importance of the limitations question and that it was a matter of first impression within the Circuit opening the possibility for certification to the Fourth Circuit under 28 U.S.C. 1292. (*Id.*) After petition to the Fourth Circuit pursuant to such statute, the petition of UTU and its officers was granted. (Pet. App. at 48a-49a). Reed did not seek interlocutory review of the holding of the district court with respect to dismissal of his claim under Title V of LMRDA. After briefing and argument the Fourth Circuit reversed, holding the six-month limitations period in 29 U.S.C. 160(b) applicable to Petitioner's claims. (Pet. App. at 48a-70a).

Background of the Dispute:

The facts as found by the district court related to this matter for present purposes are correct and are essentially uncontested. As the district court found, in August 1982, Fred A. Hardin, President of UTU, sent J. L. McKinney, one of UTU's International Auditors, to audit the books and records of Local 1715, where Reed served as Secretary-Treasurer. The audit was prompted by a letter to Presi-

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[1] References to the Appendix to the Petition appear as "Pet. App."

dent Hardin from a member of Local 1715 regarding concerns about financial stability and the future of the Local. After the audit, McKinney disallowed checks paid by the Local to Reed for "time lost" in the sum of $1,210.20. (App. at 20-21).[2]

Reed appealed McKinney's findings to President Hardin by letter dated September 6, 1982, claiming that repayment of the sum found was demanded on the basis that he get prior approval for reimbursement for "time lost." Reed claimed that no such prior approval requirement had existed or been enforced before its application and enforcement against him. (App. at 21).

President Hardin denied Reed's appeal by letter dated October 1, 1982, explaining that when a local officer is salaried, his regular salary is meant to cover the responsibilities of his office, further noting that the sum was disallowed because the claims had been for performance of ordinary duties and responsibilities. Reed thereafter sought to enforce the "prior approval" policy against other officials of Local 1715. Plaintiff's attempts were rejected by President Hardin. On June 28, 1983, Reed met with UTU Vice President K. R. Moore to determine, in his view, whether UTU planned to continue to enforce dual policies with respect to reimbursement of expense payments. Reed claims that Vice President Moore refused to discuss the matter with him. (App. at 21).

Reed's counsel wrote to President Hardin on July 1, 1983, seeking repayment of the $1,210.20 on the grounds

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[2] References to the Appendix in the Court of Appeals appear as "App."

that different standards were applied to Reed than to other union members, asserting that there was a conflict between Fred Warlick, President of Local 1715, and Reed, and that a violation of 29 U.S.C. 411 existed. President Hardin responded to Reed's counsel on July 22, 1983, stating that the issue of the time disallowed to Reed as a result of the audit was closed. Reed's counsel responded again by letter of August 2, 1983, in which he again requested reimbursement, and also informed President Hardin that he was going to advise Reed "to commence litigation on or about September 15, 1983, unless the union has properly reviewed and reconciled this matter." (App. at 22).

Reed is a long time officer at the local level within the organization. The friction between the two officers (Reed and Warlick) does go to the bargaining relationship with the employers. Reed claims that Warlick has accused him of being a "company man" and that Warlick has stated all company people are "bastards" (App. at 33). Warlick denies that allegation (App. at 44), but it is obvious that the two have some dispute with respect to how the employer in this case is to be approached in bargaining situations. Thus, the facts of this case indicate that this dispute, although internal, has external ramifications by Reed's own admission.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

Although it is apparent that to date five circuits have held that a "bill of rights" claim under Section 101 of the

Labor Management Reporting and Disclosure Act (29 U.S.C. 411) is subject to the six-month limitations period enunciated by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (*See, Lewis v. Teamsters*, 826 F.2d 1310 (3d Cir. 1987); *Steelworkers Local 1397 v. United Steelworkers of America*, 748 F.2d 1980 (3rd Cir. 1984); *Reed v. United Transportation Union*, 828 F.2d 1066 (4th Cir. 1987), *cert. pending*, No. 87-1031; *Adkins v. Int'l Bros. of Electrical Workers*, 769 F.2d 330 (6th Cir. 1985); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Clift v. United Auto Workers*, 818 F.2d 623 (7th Cir. 1987), *cert. pending*, No. 87-42; *Davis v. United Auto Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1284 (1986)), and two circuits have refused to apply the *DelCostello* limitations period, choosing to apply the most relevant state statute of limitations in accordance with the decision of this Court in *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) (*Rodonich v. House Wreckers Local 95*, 817 F.2d 967 (2d Cir. 1987); *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986)), it is equally apparent that this case does not present the best facts upon which to resolve such apparent conflict. This case involves an internal audit prompted by a member's request resulting in a $1,200.00 finding against the petitioner in this case. It does not involve rights to membership or elective office. Moreover, there is evidence of record that the internal friction between the petitioner and another union officer has some potential effect on the stability of the collective bargaining relationship with the employer, not as apparent in the cases which have applied the relevant state statute of limitations.

Of all the factors discussed in *DelCostello v. Teamsters*, *supra*, the stability of the collective bargaining rela-

tionship appears key, prompting the Second Circuit to hold the *DelCostello* six-month limitations period applicable to an action for breach of a carrier's duties under the Railway Labor Act (45 U.S.C. 151 *et seq.*) (*see, Robinson v. Pan American World Airways*, 777 F.2d 84 (2d Cir. 1985)), in line with the similar holding of the Seventh Circuit in *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914, 919 (7th Cir. 1985). It should also be noted that the First Circuit prior to this holding in *Doty v. Sewall, supra*, had held that the six-month limitations period from *DelCostello* was applicable to a claim under 29 U.S.C. 414 (dealing with the duty of labor organizations to provide access to collective bargaining agreements to members). *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984). To put it simply, whereas *Doty, supra*, and *Rodonich, supra*, apparently involve internal rights to membership or electrive strife, this case presents a claim (and at this point that is all it is) that normal internal accounting procedures were unfairly applied to a claimed political opponent. The analogy of LMRDA "bill of rights" claims to civil rights claims noted by the *Doty* court (although criticized by other courts, *see, McConnell v. Teamsters*, 606 F.Supp. 460 (S.D.N.Y. 1985)) just simply is not present in this case.

Finally, it is unfair for petitioner to argue that the decision below contained no substantial analysis, when it in fact relied upon the decision of the Third Circuit in *Steelworkers Local 1397 v. United Steelworkers of America, supra*, which, as petitioner notes, has provided the conceptual underpinning for the line of decisions applying the six-month limitations period from *DelCostello*. (Pet. at 8).[3]

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[3] References to the Petition appear as "Pet."

Moreover, the Court below itself discussed the effect that a case such as the one at bar can have on the stability of collective bargaining relationships. 828 F.2d at 1069-70. There are perhaps cases which exist which would appropriately present this issue for resolution of the conflict existing in the circuits, but this case is not such a vehicle.

———o———

CONCLUSION

For all the foregoing reasons, Respondents United Transportation Union, Fred A. Hardin, K. R. Moore and J. L. McKinney respectfuly request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

CLINTON J. MILLER, III
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United Transportation Union
14600 Detroit Avenue
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(216) 228-9400

Counsel for Respondents

No. 87-1031

In The Supreme Court of the United States

October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 16, 1987
CERTIORARI GRANTED MARCH 7, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

The following Opinions, Decisions, Judgments and Orders have been omitted in printing the Joint Appendix because they appear in the following pages in the Appendix to the printed Petition for Certiorari.

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
1985		
08-02	# 1	COMPLAINT—
08-02		Summons Iss.—Serv. for four of S&C handed to Atty for serv. JS 5 Iss.—
08-30	# 3	ANSWER OF DEFTS
11-15	# 8	MOTION OF DEFTS TO DISMISS OR FOR SUMMARY JUDGMENT (sent to RDP)
1986		
05-01	# 20	ORDER—RDP—1. The defts motion to dismiss the pltfs claim pursuant to 29 USC 411 is Denied; 2. Because the court is satisfied that its ruling on the timeliness of the pltfs claim under 29 USC 411 involves a controlling question of law as to which there is substantial ground for difference of opinion & that an immediate appeal from this ruling may advance the ultimate termination of the litigation, the defts may apply to the U.S. Court of Appeals for the Fourth Circuit within 10 days of the date this order is filed for permission to appeal this ruling pursuant to 28 USC 1292(b); 3. The defts Motion to dismiss the pltfs claim pursuant to 29 USC 501 is Granted; 4. The defts Motion to dismiss the pltfs state law claims is Denied; and 5. Should the defts apply for an interlocutory appeal pursuant to 28 USC 1292(b), that application shall stay all proceedings in this Court. cc: Attys CO VOL XXXI-A, (p) 129

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

G. P. REED, Plaintiff, v. UNITED TRANSPORTATION UNION, FRED A. HARDIN, K. R. MOORE and J. L. McKINNEY, Defendants.	)	CIVIL ACTION NO. C-C-55-477-P (Filed Aug. 2, 1985)

COMPLAINT

JURISDICTION

1. This is an action to enforce the rights of a member of a labor organization as guaranteed by 29 U.S.C. § 411 and § 501. Jurisdiction is asserted pursuant to 29 U.S.C. §§ 412 and 501 and pursuant to 28 U.S.C. § 1331.

Plaintiff also seeks a declaratory judgment of his rights under the pertinent statutes and jurisdiction is therefore asserted under 28 U.S.C. § 2201 and § 2202.

Plaintiff further invokes the pendant jurisdiction of the Court.

PARTIES

2.. Plaintiff is a citizen and resident of the United States now residing in Mecklenburg County, North Carolina.

3. The defendant United Transportation Union ("UTU") is a labor organization within the meaning of 29 U.S.C. § 401 *et seq.* with its principle place of business in Cleveland, Ohio.

4. The defendant Fred A. Hardin is the President of UTU and is a citizen and resident of Cleveland, Ohio.

5. The defendant K. R. Moore is a Vice President of UTU and is a citizen and resident of Cleveland, Ohio.

6. The defendant J. L. McKinney is an International Auditor of UTU and is a citizen and resident of Evans, Georgia.

FACTS

7. The plaintiff, at all times pertinent to this action, has served as the Treasurer of Local 1715 of the UTU.

8. Subsequent to the audit in late August of 1982 plaintiff was informed by defendant McKinney that claims for lost time previously made by plaintiff and paid by the Local in the amount of $1,210.10 would be disallowed and plaintiff would be required to reimburse this amount to the Local. The reason given for this decision was that plaintiff was required to get the "prior approval" of the Local before undertaking any Local business that would require lost time.

9. No such "prior approval" requirement had ever been communicated to plaintiff who had followed the standard practice of submitting his lost time claim to the Local for approval after the claim occurred but prior to payment. Plaintiff had handled his lost time claim in precisely the same manner as he handled lost time claims for

all Local officers and members. Plaintiff appealed the rejection of his claims to defendant Hardin who rejected the appeal again citing unspecified "regulations" which have never been furnished to plaintiff.

10. Subsequently, plaintiff sought to further appeal the rejection of his claim through defendant Moore. Again, the appeal was denied with no explanation.

11. Subsequent to the audit plaintiff has been required by defendant Hardin to pay claims of Local officers and members which did not have prior approval. This requirement is in direct contravention of the "regulations" applied to plaintiff's claims. The actions by defendants Hardin, Moore and McKinney are wilful and conscious acts by these defendants to discourage plaintiff from participating in Local activities and in holding office in the Local.

12. Defendants Hardin and Moore have consistently acted in support of the actions of A. Fred Warlick, General Chairman of Local 1715. Whenever plaintiff has sought to adhere to the constitution and regulations of the defendant UTU and the Local and to oppose acts by Warlick which were in contravention of the constitution and regulations of the defendant and Local 1715, defendant Hardin and Moore have supported Warlick.

CAUSES OF ACTION

13. The actions by the defendants in requiring plaintiff to reimburse the Local for claims previously paid in accordance with policy and practice is a effort by defendants to deprive plaintiff of his equal rights and privileges guaranteed by 29 U.S.C. § 411.

14. The actions by the defendants constitute a violation of the fiduciary responsibilities of labor organizations imposed on defendants by 29 U.S.C. § 501.

15. Plaintiff has exhausted the remedies available to him through the procedures of UTU. Further resort to any such remedies are futile.

16. The actions by defendants also constitute a breach of defendant UTU's implied contract with plaintiff as Local Treasurer or in the alternative plaintiff asserts a claim of quantum meruit for services rendered to defendant UTU.

RELIEF

Plaintiff prays that the Court:

17. Issue a declaratory judgment declaring the acts of the defendants to be unlawful.

18. Enjoin the unlawful acts of the defendants.

19. Award the plaintiff damages, including but not limited to, the lost claims in the amount of $1,210.20.

20. Award the plaintiff his costs, expenses and reasonable attorneys' fees.

21. Award plaintiff such other relief as the Court may deem just and proper.

This 2nd day of August, 1985.

Respectfully submitted,

/s/ JOHN W. GRESHAM
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Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
704/375-8461

Attorney for Plaintiff

(Request for Jury Trial omitted in printing)

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

ANSWER OF DEFENDANTS

Defendants herein, by their undersigned counsel, submit the following as and for their answer to the Complaint filed herein.

FIRST DEFENSE

Defendants respond to the numbered paragraphs of the complaint as follows.

1. This paragraph contains jurisdictional allegations requiring no response; but to the extent that a response may be deemed to be required, deny.

2. Admit based upon information and belief.

3. Admit that Defendant United Transportation Union ("UTU") is an unincorporated labor organization having its international headquarters at Cleveland, Ohio, and that it is the duly designated representative of certain employees of certain employers primarily in the transportation industry under both the Railway Labor Act (45 U.S.C. 151 *et seq.*) and the Labor Management Relations Act (29 U.S.C. 141 *et seq.*)

4.-7. Admit.

8. Admit that International Auditor J. L. McKinney conducted an audit of Local 1715 from August 26, 1982 through September 1, 1982, and that the findings that Plaintiff had to repay Local 1715 $1,210.20 were based upon a finding that Plaintiff was salaried by the local at $250.00 per month, and that when that sum was raised from $190.00 in 1980, the local did not allow payment for

any sums over and above $250.00 for performing the functions of Secretary-Treasurer. Deny remaining allegations.

9-10. Deny, and refer the Court to the letter of Plaintiff to Defendant Hardin dated September 6, 1982, and Defendant Hardin's response dated October 1, 1982, attached hereto as Exhibits 1 and 2, respectively.

11.-16. Deny.

17.-21. Plaintiff is not entitled to the relief requested or to any relief whatsoever from Defendants.

Any allegation of the Complaint not admitted, denied or modified, is hereby denied.

SECOND DEFENSE

The Court lacks subject matter jurisdiction over all or portions of the allegations in the Complaint.

THIRD DEFENSE

The Complaint fails to state a claim for relief against Defendants.

FOURTH DEFENSE

The Complaint has been brought outside the applicable statutes of limitations.

FIFTH DEFENSE

Plaintiff has failed to exhaust his internal union remedies.

SIXTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

SEVENTH DEFENSE

The Complaint is barred by the equitable doctrine of laches.

WHEREFORE, Defendants pray the Court to dismiss this action, award them their costs and attorney's fees and such further relief as may be proper.

Respectfully submitted,

/s/ .....
Clinton J. Miller, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107
(216) 228-9400

/s/ .....
J. David James
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(919) 274-2992

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

MOTION OF DEFENDANTS TO DISMISS, OR
FOR SUMMARY JUDGMENT

Defendants herein respectfully move the Court, pursuant to *Fed. R. Civ. Pro.* 12(b)(1)(6), to dismiss the Complaint filed herein on the following independent grounds:

(1) Plaintiff has failed to file the complaint within the applicable six-month statute of limitations;

(2) Plaintiff has failed to exhaust available internal union remedies;

(3) Plaintiff has failed to state a claim for relief in the complaint;

(4) Plaintiff's claims under implied contract and quantum meruit theories are outside of the subject matter of jurisdiction of the court.

In the alternative, should the Court consider documents outside the pleadings, then, pursuant to *Fed. R. Civ. Pro.* 12(b) and 56, Defendants respectfully move the Court for summary judgment of dismissal of the complaint, there being no genuine issue as to any material fact, and defendants being entitled to judgment as a matter of law on one or more of the independent grounds noted above.

A memorandum of points and authorities in support of this motion with accompanying affidavits is being filed herewith.

Respectfully submitted,

/s/ Clinton J. Miller, III

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Attorneys for Defendants

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

(Caption omitted in printing)

AFFIDAVIT OF KENNETH N. FOUTS

I, Kenneth N. Fouts, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state that the following facts are true and correct.

1. I am Section Head, Files and Records of the United Transportation Union (hereinafter, "UTU") and have held that position since February, 1980;
2. That in such position I am the official custodian of correspondence and materials sent to the President of the UTU and by the President of the UTU, which are retained in the President's file room;
3. That the exhibits attached hereto as described below are true copies of originals contained in the President's file room;
   a. Letter dated August 14, 1982 from Pat Clark, Member Local 1715, to UTU President Hardin;
   b. Letter dated August 23, 1982 from UTU President Hardin to G. P. Reed, Treasurer Local 1715;
   c. Letter dated September 2, 1982 from UTU International Auditor J. L. McKinney to UTU President Hardin;
   d. Letter dated September 6, 1982 from G. P. Reed, Treasurer Local 1715, to UTU President Hardin;
   e. Letter dated October 1, 1982 from UTU President Hardin to G. P. Reed, Treasurer Local 1715;
   f. Letter dated July 18, 1983 from John Gresham, Esq. to UTU President Hardin;

AFFIDAVIT OF KENNTH N. FOUTS (cont'd.)

   g. Letter dated July 22, 1983 from UTU President Hardin to John Gresham, Esq.;
   h. Letter dated August 2, 1983 from John Gresham, Esq. to UTU President Hardin.

Executed on November 5, 1985.

/s/ Kenneth N. Fouts
Kenneth N. Fouts

August 14, 1982
1818 Progress Lane
Charlotte, North Carolina 28205

Mr. Fred A. Hardin
President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Dear Mr. Hardin:

I am writing this letter to you due to my concerns for the future of Local 1715, United Transportation Union. As you know, Transit Management of Charlotte, Inc. has created an enormous expense on our Local by forcing the Committee of Adjustment into almost continuous battles, handling the grievances which arise and numerous arbitration cases and charges with the National Labor Relations Board. This has exhausted the committee's funds to the point where the drivers committee did not get paid for the time they lost for the month of July, 1982; although I believe the Local has approximately $5,000.00 in the General Fund.

Mr. G. P. Reed, the Local's Secretary and Treasurer, in my opinion is very reluctant to allow a vote to raise the Committee Assessment so as to have money to operate on. This action on Mr. Reed's part is playing into the hands of the Company, as I see it. The current Labor Agreement expires January 31, 1983, which is only five (5) months away. It is a known fact the Committee cannot lose the necessary time required to negotiate a Labor Agreement without being reimbursed for the time lost. Mr. Reed is being paid $250.00 per month salary by Local 1715 to handle the Secretary and Treasurer job. We have reason to believe that Mr. Reed is billing the local in addition for time lost to file his reports and sell insurance, most of which is on his off days.

I am asking for an investigation in these matters by the International to find out if there are any misunderstandings in the way the money is being appropriated and spent, and to help get this Local back on the right track before it is too late. I request an audit be done in the presence of the Local's President and the General Chairman of the Committee of Adjustments.

I believe that our problems are political since some of our members have been told in a gossip fashion by Mr. Reed that the General Chairman has been taking off too much time, and that there is no need for additional assessment, not to mention many conflicts that arise in similar fashions almost daily.

The records will show that the General Chairman withdrew five (5) grievances from arbitration in favor of a National Labor Relations Board settlement in which all decisions

were in favor of the Union which saved the Local several thousand dollars in arbitration cost.

The General Chairman has worked numerous hours on his own time without billing the Local for such, and he certainly deserves pay for the hours he lost and the expense he paid out of his pocket during the long National Labor Relations Board proceedings during the month of July this year.

I thank you for your cooperation in this matter.

Fraternally yours,

/s/ Patrick Clark
Patrick Clark

CC: Mr. J. H. Shepherd
Mr. Kenneth R. Moore

August 23, 1982

Mr. G. P. Reed
LC&S&T—Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This is to advise you and your local that I have today assigned Brother J. L. McKinney, International Auditor, to audit the books and records of Local 1715.

I am sure Brother McKinney will notify you when he can arrange his schedule to make this audit.

Your cooperation and any courtesies extended to Brother McKinney will be greatly appreciated by the undersigned.

With best wishes, I am

Fraternally yours,

/s/ Fred A. Hardin
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP-UTU
Mr. Paul Gillard, Jr., Pres. 1715
Mr. A. Fred Warlick, LC 1715
Mr. Telphia Beatty, Jr., LR 1715
Mr. P. O. Clark, Mbr. 1715
Mr. H. L. Hunter, FS

bc: Mr. J. L. McKinney, International Auditor

September 2, 1982

Mr. Fred A. Hardin, President
United Transportation Union
14600 Detroit Ave.
Cleveland, Ohio 44107

Dear Sir and Brother:

Re: Audit No. 112-A—Local 1715

I departed Evans Georgia August 26, 1982, at 9:30 AM, enroute to the Augusta airport, and departed by Atlantis Airlines at 10:15 AM, enroute to Charlotte, North Carolina arriving at 11:10 AM, to begin the audit of Local 1715.

I audited on August 26, 27, 28, 29, 30, 31, September 1.

I was met in Charlotte by General Chairman Warlick, and discussed the problems of Local 1715.

Brother Paul Reed, Secretary & Treasurer of Local 1715 was called and he brought the books and records to me at once, and I began the audit.

After talking to both Brother Reed and Brother Warlick I soon found out that they have quite a feud going on between them. It seems that each one of them is accusing each other of spending too much money.

The expenses of the Drivers committee are very high, and it seems to me the reason for this is that whenever there is a hearing or investigation the entire committee marks off from work, and attends the hearing. Then each one of them is then paid for time lost. This is causing a big burden on the committee funds, as the assessments are only $5.50 per month. This has been going on for some time and as of now the committee funds are in the red in the amount of $2,300.00 I had the committee in for a talk and I explained to them why the fund was in the red. At this time they told me that they was going to have the committee assessments increased as soon as possible. All bills and time lost for the committee was approved in the Local.

I found that Brother Reed had been taking some days off to do Local book work, just as Mrs. Patrick Clark had accused him of doing. Brother Reed also mark off his regular job once every month to attend the Local meeting, and also the President of the local was doing the same. They were both being paid for time lost on both of these days.

The days that Brother Reed mark off for book work, and for reasons that was not explained on the checks were not allowed during the audit, and Brother Reed repaid the Local this amount that came to $1,210.20. I disallowed these checks because he was getting a monthly salary in the amount of $250.00 per month, which is a little above

the average for a local the size of his local. Also in the first part of 1980 the local increase his salary from $190.00 per month to $250.00 per month, and did not allow for any time lost to do book work or at least I could not find any record of it. I feel that if he needed some time he could have used the one day per month that lost to attend the morning meeting. In fact some of the days there was not enough members present to hold a meeting therefore Brother Reed would have had the entire day to do book work.

I called the President of the local and had him in so that I could discuss some of the local's problems with him. Both he and Brother Reed was present at the time, and I told them that they would need to see that the Committee assessments were raised enough to get the committee out of the red, and keep it in the black so that it would not get back in this shape again.

All dues are being collected by Brother Reed, and he is keep all books and records as required.

The audit being completed on September 1, 1982, I departed Charlotte on September 1, at 2:10 PM, arriving Augusta Airport by Atlantis Airlines at 3:00 PM, and then on to Evans Georgia, at 3:30 PM.

Fraternally Yours,

J. L. McKinney
International Auditor

Charlotte, NC
September 6, 1982
Local 1715

Mr. Fred A. Hardin, President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Dear Sir and Brother:

An audit of the books of Local 1715 has been completed. The International Auditor, J. L. McKinney, has disallowed time claimed by me totaling $1,210.20 that was approved by the Local. All concerned were satisfied at the time these bills were presented.

Brother McKinney said I should have had prior permission before taking the time off that he disallowed. I do not understand this because I thought I was generally acquainted with the policies. I have never received any type of instructions to my knowledge of this policy. It appears that someone around me had gotten knowledge of this policy and decided to make trouble for me instead of suggesting that I check with the audit department.

The member who made the complaint has been a member since September 1, 1981, has attended five regular meetings, and could not have known very much about Local affairs. When Brother McKinney came to audit the Local books, this member did not meet, see or communicate with the Auditor, but the Chairman of the Committee of Adjustment did meet with the Auditor before I met with him.

Brother Hardin, after you have had time to study the audit report and my request I hope you will feel led to help me recover all or part of the disallowed time.

Enclosed is my itemized list and explanation of the disallowed time by the Auditor.

With best wishes,

Fraternally yours,

/s/ G. P. Reed
G. P. Reed, Sec.-Treas.
Local 1715

Time Disallowed by Auditor

1. Check No. 1850—40 hours—$298.80

   Monday, January 7, 1980
   Tuesday, January 8, 1980
   Wednesday, January 9, 1980

   Monday, January 14, 1980
   Tuesday, January 15, 1980

   This time is two days above normal, but the Board of Trustees and the Local were satisfied that the days were applied to Local interest.

2. Check No. 1864—24 hours—$180.24

   Wednesday, February 13, 1980. I was off to complete a L-M2 amended report.

   February 20, 1980—February 21, 1980
   Sixteen hours working with H. L. Hunter, Field Supervisor.

3. Check No. 1918—8 hours—$62.48

   Thursday, September 11, 1980
   Working with H. L. Hunter

4. Check No. 1939—16 hours—$126.72

   Monday, September 29, 1980
   Tuesday, September 30, 1980
   Working with H. L. Hunter

5. Check No. 1987—8 hours—$64.32

   Wednesday, December 31, 1980

   This eight hours was getting election material together for run-off election between Ronald Hyde and Noel B. Shephard for Vice President.

6. Check No. 1998—24 hours—$192.92

   Tuesday, January 13, 1981
   Wednesday, January 14, 1981
   Wednesday, January 21, 1981

   These three days were making up annual, wage and tax reports for the year, and meeting with Board of Trustees in annual audit.

7. Check No. 2054—8 hours—$69.04

   Thursday, May 14, 1981

   Shopping for copy machine for Local use. Found what we could afford and purchased one later.

8. Check No. 2155—24 hours—$215.64

   Wednesday, January 13, 1982
   Thursday, January 14, 1982
   Friday, January 15, 1982

   Annual reports and meeting with Board of Trustees in annual audit. All concern were satisfied with the time and did approve it.

9. The time I have listed with Brother H. L. Hunter, Field Supervisor, can be verified by the insurance application dates.

/s/ G. P. Reed

October 1, 1982

Mr. Gordon P. Reed
LC, S&T—Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This will acknowledge your letter of September 6, 1982 concerning time claims in your behalf for services performed on various dates during 1980 through January, 1982.

Obviously, your letter was prompted by actions that occurred during the recent audit of the accounts of Local 1715. I have thoroughly reviewed the report of the auditor and certainly subscribe to his observations concerning the method of disbursements against the driver's local committee, and particularly your claims which were rejected as attached to your letter.

The audit discloses that the driver's local committee is presently in deficit operation in the amount of $2,300.00. There is no provision in the Constitution that authorizes continuing deficit spending. Steps must be taken as not to incur any further expenses against the account. Hearings and investigations *do not require* the full committee to mark off from work to be present at hearings and investigations.

It is imperative that the local chairman and members of his committee take immediate steps to curtail the cost of representation to the extent that the expenses be kept below the income derived from local committee of adjustment dues and to keep the cost of operation at a low level so as to enable to use a portion of the committee's income to apply toward the present deficit.

It is important to impress upon all concerned that until such time as money accrues in the LCA Fund, no time, other than the General Chairman on urgent matters, should be lost in performing committee work. If a member requires representation, arrangements must be made, if possible, from among the members of the local committee by one who is off duty or on a layover. Any such arrangement *must be at the direction* of the local chairman.

Appropriate action of Local 1715 must be taken as soon as possible to increase the local committee assessments. This is a crucial matter since negotiations for a new labor agreement will begin in a few months. I should be advised of the action taken on this matter and amount of assessment.

The audit report also reveals that your monthly salary as secretary-treasurer is $250.00, yet, you have claimed on certain dates additional time for handling election material, preparing annual wage and tax reports, shopping for a copy machine, working with Field Supervisor Hunter, etc.

When a local officer is salaried, such compensation covers the responsibility of his office. When you were elected to your position, you assumed all responsibilities and duties of such office.

Under no circumstances can a claim be made against a local for "working with a Field Supervisor." This is not a liability of the local and any such future claims must be discontinued as well as those you outlined in the attachment to your letter.

Furthermore, I find that the local president, as well as yourself, have marked off your regular assignments to be in attendance at local meetings even though at times a quorum is not present to conduct a meeting. I am sure you realize that such an arrangement can become a financial burden upon the local. Unless specific approval has been granted by local action, this arrangement must be discontinued immediately. In the absence of a local president and secretary-treasurer at a meeting, temporary officers can be appointed to conduct the business of the local.

In conclusion, this letter is to alert all concerned that the matters outlined above are not consistent with our law and now must be corrected. For that reason, copies of this letter are being furnished to all concerned with the operation of the local.

Fraternally yours,

/s/ Fred A. Harding
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP, Dir., Bus Dept.
All Officers and Committee Members, L-1715

bc: Mr. Jim Swann
FAH:JFS:cg

July 18, 1983

Mr. Fred A. Harding
International President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107

Re: Local 1755, Transit
Management of Charlotte,
Inc. and G. P. Reed

Dear President Harding:

I have been retained by Mr. G. P. Reed to represent him on several matters involving the United Transportation Union.

The first issue concerns the fact that Mr. Reed has been subject to different standards with regard to his Union expenses than are applied to other members of the Union.

As you know, Mr. Reed was required to reimburse the Union for expenses which had been previously approved by the Local. Since that time, he has been required to pay other members of the Local for expenses which had not been previously approved.

Also, I am most concerned about the tone and content of the letter of June 28, 1983 to you from Mr. Kenneth R. Moore, Vice-President and Director of the Bus Department. Mr. Moore's letter in no way sets out an accurate description of the meeting which took place on June 25, 1983. Mr. Reed has asked Mr. Moore to have the meeting taped so that everyone would have a fair and accurate transcription of what took place. Mr. Moore not only refused, but also then filed a subjective and slanted report as to what took place. It is clear that his letter of June 28, 1983 is meant to impune Brother Reed and not to report the facts of what took place at the meeting.

It appears that the heart of this conflict involves Mr. A. Fred Warlick's actions to harass, intimidate and retaliate any member of the Local whom he feels does not support him as general chairman or in his efforts to seek other Union positions. As you know, any efforts by the International to support Mr. Warlick in these efforts may well constitute violations of 29 U.S.C. § 411.

Mr. Reed has long been an active and devoted Union member. I am surprised that the International has responded to his justifiable concerns in the manner that it has. I hope that we will be able to resolve this matter quickly to avoid further litigation.

Yours truly,
John Gresham

JG:rcl

July 22, 1983

Mr. John Gresham
Attorney at Law
Suite 730 East Independence Plaza
951 South Independence Blvd.
Charlotte, North Carolina 28202

Dear Mr. Gresham:

In reference to your letter of July 18, 1983, the fact is that Mr. Reed, in his position with Local 1715, was subject to an audit.

Upon such being carried out as provided by regulations, he was found to be liable for repayment of funds to the Local as required under the circumstances and the issue was considered closed upon repayment.

As to the letter of June 28 from Mr. K. R. Moore that you find of concern, it seems evident that Mr. Moore was present and knew what transpired. I see no intent whatsoever on the part of Mr. Moore to diminish the stature of Mr. Reed.

Yours truly,

/s/ Fred A. Hardin
F. A. Hardin
President

August 2, 1983

Mr. F. A. Hardin, President
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250

Re: Local 1715, United
Transportation Union

Dear President Hardin:

I have reviewed your letter of July 25, 1983.

As I set out to you in our earlier letter, it appears that the audit that was conducted was *not* in fact conducted pursuant to "regulations."

As to my comments concerning the letter of Mr. Moore, I was attempting to inform you of the fact that the other parties who were present did not feel that Mr. Moore had accurately represented what took place at the meeting.

I have advised Mr. Reed of your response concerning his request for reimbursement. I have also advised him of my recommendation to commence litigation on or about September 15, 1983, unless the Union has properly reviewed and reconciled this matter.

Yours truly,

/s/ John Gresham
John Gresham

JG:rcl

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF G. P. REED

G. P. Reed, being first duly sworn deposes and says:

1. I am a member in good standing of Local 1715 of the United Transportation Union.

2. In the fall of 1967 I was elected to the position of Treasurer/Secretary of Local 1715. I have held this position since that time having been last elected in the fall of 1984.

3. On a number of occasions I have opposed the actions of A. Fred Warlick, who for a number of years has been the General Chairman of Local 1715. Specifically:

a. In the fall of 1974 I ran against Warlick for the delegate to the National Convention of the Union and defeated him for the position. Warlick then refused to accept the position as alternate delegate.

b. In 1978-79 I served on the bargaining committee of Local 1715. During the bargaining I attempted to suggest to Warlick that he use a less hostile tone in the bargaining. Following the negotiations Warlick stated that "Reed is a company man" and that "all company people are bastards." He continued to make these comments through at least 1983.

c. In the spring of 1982 Warlick requested reimbursement for time spent in a grievance on January 8, 1982. After the reimbursement was made I learned that Warlick had also received pay from the company for a portion of the January 8, 1982 time

claimed on the reimbursement. When I questioned Warlick about this payment he became angry and refused to discuss the matter.

d. Throughout the spring and summer of 1982 I continued to make numerous requests of Warlick to make reimbursement to the Local for his time paid to him by the bus company on January 8, 1982. At the August 1982 meeting Warlick and others made claims for reimbursement of approximately $1,400.

e. At the time there were not sufficient funds in the treasury to pay all of the reimbursement requests. I so informed the members.

f. Warlick then stated that he did not want any funds if he could not get all that he had requested.

4. On August 25, 1982, I was informed that I would be audited by J. L. McKinney.

5. McKinney had been informed by Chief Auditor Swann prior to the audit that "I had a feud going with Warlick," that after "talking with Vice President Moore" Swann had instructed me "to pay lost time due General Chairman Warlick," and that "we have been told that Treasurer Reed is calling members telling them that no increase is needed and General Chairman Warlick is spending too much money. (See Exhibit A attached hereto which is provided by the defendants in response to a discovery request).

6. McKinney was asked to "take care of this assignment."

7. Upon his arrival in Charlotte Auditor McKinney was met at the airport by Warlick and escorted to the audit.

8. Although Auditor McKinney disallowed my reimbursement for reimbursement that had been approved

by Local 1715 on the basis that the approval was not obtained before the work was done, he could not provide me with any regulation which required such "prior approval."

9. During the audit, I raised with Auditor McKinney the fact that Warlick in January of the year had requested reimbursement for time for which he had received pay from the company. Auditor McKinney stated that he was not prepared to think about that matter at that time.

10. I paid the money, $1,210.20, and appealed to President Hardin from the decision of Auditor McKinney.

11. President Hardin denied the appeal. In his denial (Exhibit B) President Hardin also demanded that Local 1715 increase its local committee assessments.

12. In the fall of 1982 the Local President sought reimbursement for matters for which he had not gotten prior approval.

13. When I questioned these requests, President Hardin required that I pay them on the grounds that they were not "costly items."

14. On a number of occasions since the fall of 1982 I have been required to pay items for which there was no "prior approval." For example, on August 16 and 17, 1983, the Local President attended the Southern Christian Leadership Conference and requested reimbursement. No prior approval had been given for that expense. No explanation has been given for the failure to apply these "prior approval standards."

15. When I requested that the same standard be applied to me that is applied to others, President Hardin has refused to do so.

16. The actions taken by President Hardin and Vice President Moore have caused me not to speak out on a number of union issues for fear of further retaliatory treatment.

Further the deponent sayeth not.

This 14th day of January, 1986.

/s/ G. P. Reed
G. P. REED

EXHIBIT A

August 23, 1982

Mr. James L. McKinney
International Auditor
4341 Owens Road
Evans, GA 30809

Dear Sir and Brother:

I am sending you the audit file of Local 1715 along with the preliminary data and a commission in your favor prepared in the International Headquarters for taking up this audit as explained in the following paragraph:

> Local 1715, Charlotte, North Carolina, is at the request of Vice President K. R. Moore and member, Patrick O. Clark, 1818 Progress Lane, Charlotte, North Carolina 28205. (Please see his letter of August 14, 1982).

We have reason to believe that the General Chairman of the drivers, Brother Fred A. Warlicks and Secretary

and Treasurer G. Paul Reed have a feud going. Brother Reed permitted Warlicks' fund to become deficient without informing the committee of a needed assessment.

Brother Reed called the International stating local committee of adjustment for drivers was requesting the local funds be transferred to the grievance fund to pay lost time for Brother Warlicks. Not knowing the whole story, I told him he was correct not to transfer funds, I talked with Vice President Moore and called Local President and Treasurer Reed and told him to pay lost time due General Chairman Warlicks, but not expense, with a loan from the local dues and to increase local committee of adjustment assessment the next meeting.

We have been told that Treasurer Reed is calling members telling them that no increase is needed and General Chairman Warlicks is spending too much money.

We had Treasurer Reed into the International for training as auditor, but after arriving back home he resigned before his first assignment. We are also told that he will "mark off" his job and claim time as doing Treasurer's work. *No* lost time should be paid as he has an exorbitant salary anyway.

I am asking you to take care of this assignment just as soon as possible and if you have any questions pertaining to this assignment, kindly contact me at once.

Fraternally yours,
/s/ Jim Swann
Jim Swann
Chief Auditor

EXHIBIT B

October 1, 1982

Mr. Gordon P. Reed
LC, S&T - Local 1715
3349 Maywood Drive
Charlotte, NC 28205

Dear Sir and Brother:

This will acknowledge your letter of September 6, 1982 concerning time claims in your behalf for services performed on various dates during 1980 through January, 1982.

Obviously, your letter was prompted by actions that occurred during the recent audit of the accounts of Local 1715. I have thoroughly reviewed the report of the auditor and certainly subscribe to his observations concerning the method of disbursements against the driver's local committee, and particularly your claims which were rejected as attached to your letter.

The audit discloses that the driver's local committee is presently in deficit operation in the amount of $2,300.00. There is no provision in the Constitution that authorizes continuing deficit spending. Steps must be taken as not to incur any further expenses against the account. Hearings and investigations *do not require* the full committee to mark off from work to be present at hearings and investigations.

It is imperative that the local chairman and members of his committee take immediate steps to curtail the cost of representation to the extent that the expenses be kept below the income derived from local committee of adjust-

ment dues and to keep the cost of operation at a low level so as to enable to use a portion of the committee's income to apply toward the present deficit.

It is important to impress upon all concerned that until such time as money accrues in the LCA Fund, no time, other than the General Chairman on urgent matters, should be lost in performing committee work. If a member requires representation, arrangements must be made, if possible, from among the members of the local committee by one who is off duty or on a layover. Any such arrangement *must be at the direction* of the local chairman.

Appropriate action of Local 1715 must be taken as soon as possible to increase the local committee assessments. This is a crucial matter since negotiations for new labor agreement will begin in a few months. I should be advised of the action taken on this matter and amount of assessment.

The audit report also reveals that your monthly salary as secretary-treasurer is $250.00, yet, you have claimed on certain dates additional time for handling election material, preparing annual wage and tax reports, shopping for a copy machine, working with Field Supervisor Hunter, etc.

When a local officer is salaried, such compensation covers the responsibility of his office. When you were elected to your position, you assumed all responsibilities and duties of such office.

Under no circumstances can a claim be made against a local for "working with a Field Supervisor." This is not a liability of the local and any such future claims must

be discontinued as well as those you outlined in the attachment to your letter.

Furthermore, I find that the local president, as well as yourself, have marked off your regular assignments to be in attendance at local meetings even though at times a quorum is not present to conduct a meeting. I am sure you realize that such an arrangement can become a financial burden upon the local. Unless specific approval has been granted by local action, this arrangement must be discontinued immediately. In the absence of a local president and secretary-treasurer at a meeting, temporary officers can be appointed to conduct the business of the local.

In conclusion, this letter is to alert all concerned that the matters outlined above are not consistent with our law and now must be corrected. For that reason, copies of this letter are being furnished to all concerned with the operation of the local.

Fraternally yours,
/s/ Fred A. Hardin
President

cc: Mr. J. H. Shepherd, GS&T
Mr. K. R. Moore, VP, Dir., Bus Dept.
All Officers and Committee Members, L-1715

bc: Mr. Jim Swann

FAH:JFS:cg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF COLLIE BOYD, JR.

Collie Boyd, Jr., being first duly sworn, deposes and says:

1. In the summer of 1982 I had declared myself as a candidate to be Local 1715's delegate to the Union's National Convention.

2. Fred Warlick also sought the position as delegate to the Convention.

3. During the audit of G. P. Reed in August, 1982, Telphia Beatty, then Vice Chairman of Local 1715, said to me while we were riding to the motel where the audit was being held that "they had me and Paul Gillard for claiming time lost, but they probably weren't going to bother Paul Gillard and I since they were after G. P. Reed."

4. Beatty also said that I should withdraw from the race for national delegate and let Fred have it.

5. I told Beatty that I did not think I had done anything wrong and that I would not be pressured by him and Fred into withdrawing.

Further the deponent sayeth not.

This 13th day of January, 1986.

/s/ Collie Boyd, Jr.
Collie Boyd, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF JAMES SWANN

I, James Swann, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. In my letter dated August 23, 1982, which was attached as Exhibit A. to the affidavit of G. P. Reed, I was attempting to direct Auditor McKinney to perform the audit of G. P. Reed. In that letter I told him the letter of Patrick Clark triggered the audit. I also tried to make him aware of the situation in the local as I knew it.

2. Mr. Reed's statement in paragraph 6 of his affidavit that McKinney was asked to "take care of this assignment" appears to imply something other than my intent. In fact, that phrase is used by me as a matter of form in making audit assignments as is clear by the assignment I gave G. P. Reed himself after he had qualified as an International Auditor by letter dated October 19, 1979, which I attach a copy of to this affidavit. Mr. Reed at that time did not complete that assignment which I then gave to another auditor.

EXECUTED ON Jan. 29, 1986.

/s/ James Swann
James Swann

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF A. FRED WARLICK

I, A. Fred Warlick, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. Contrary to the statements made in the affidavit of G. P. Reed when I did not succeed in being elected a Delegate to the UTU Convention in the Fall of 1974, I simply decided not to run for Alternate Delegate. My decision had nothing to do with Mr. Reed's election.

2. In 1978-79 while Mr. Reed and I were on the bargaining committee of Local 1715, I never made statements following the negotiations that "Reed is a company man" or that "all company people are bastards." I do not remember any hostility between Mr. Reed and I. We simply disagreed over some contract proposals.

3. I requested reimbursement for time spent in a grievance on January 8, 1982, on which day I worked 2 hours for the company, and then at the company's request I clocked out to represent a driver member who would not talk without union representation. I spent from 8:30 a.m. until 9:00 p.m. on this matter, and it was brought up to the membership three times, and all three times they voted to pay it.

4.. In about August of 1982 I made a request for reimbursement of about $900.00 as I recollect, although it could have been for more. At the time I did not know about the status of assessments or that they were separated as between drivers and garage people. My recollection was that the members approved the payment while I was handling these labor board matters with one of our retained lawyers. Eventually, President Hardin ordered that the payment be made to me.

EXECUTED ON 1/30/86.

/s/ .....
A. Fred Warlick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-85-477-P

(Caption omitted in printing)

AFFIDAVIT OF TELPHIA BEATTY

I, Telphia Beatty, pursuant to 28 U.S.C. 1746, and under penalty of perjury, do state the following facts to be true and correct.

1. Contrary to the statement in the affidavit of Collie Boyd, Jr., I never told Mr. Boyd that "they (the auditor) had me and Paul Gillard for claiming time lost, but they probably weren't going to bother Paul Gillard and I since they were after G. P. Reed." I rode to the motel where the auditor was staying in my pickup truck with Mr. Boyd and A. Fred Warlick. Nobody made any statements like Mr. Boyd's statement and there was no discussion along those lines.

2. In about January of 1983 after Mr. Boyd's second election as Delegate to the UTU Convention, he asked me to help him get money to attend the Convention. When I told him I could not help him, he asked me if A. Fred Warlick would want to go to the Convention in his place. I told him that Fred could not go because he was not the Alternate Delegate.

3. Mr. Boyd never told me that he had not done anything wrong and that he would not be pressured by me and

Fred into withdrawing as Delegate because I never pressured him in any way.

EXECUTED ON 1/30/86

/s/ .....
Telphia Beatty

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

C-C-85-477-P

(Caption omitted in printing)

ORDER

(Filed May 1, 1986)

THIS MATTER was heard before the undersigned on January 31, 1986 in Charlotte, North Carolina on the Defendants' Motion to dismiss or for summary judgment. The Defendants were represented by Clinton J. Miller and J. David Jones, Attorneys at Law. The Plaintiff was represented by John W. Gresham, Attorney at Law.

The Plaintiff, G. P. Reed, is the Secretary/Treasurer of Local 1715 of the Defendant United Transportation Union, which is a labor organization within the meaning of 29 U.S.C. § 401 *et seq.* In August, 1982, Defendant Fred A. Hardin, President of the Union, sent Defendant J. L. McKinney, International Auditor of the Union, to Charlotte, North Carolina to audit the books and records of Local 1715. The audit was prompted by a letter to Defendant Hardin from a member of Local 1715 regarding his concerns about the financial stability and future of the Local. As a result of the audit, Defendant McKinney disallowed checks paid by the Local to the Plaintiff for "time lost" in the amount of $1,210.20.

The Plaintiff paid the amount disallowed, but appealed Defendant McKinney's findings to Defendant Hardin by way of a letter dated September 6, 1982. The

Plaintiff claimed that the repayment of the $1,210.20 was demanded on the ground that he was required to get approval for reimbursement for "time lost" to do various tasks *before* "losing" the time and doing the work. He further claimed that no such prior approval requirement had existed or been enforced before its application to him.

Defendant Hardin denied the Plaintiff's appeal in a letter dated October 1, 1982. Hardin explained that when a local officer is salaried, his regular salary is meant to cover the responsibilities of his office. He noted that the payments that were disallowed had been claimed for the performance of ordinary duties and responsibilities of his office.

The Plaintiff subsequently sought to enforce the "prior approval" policy he claims had been applied to him when Local President Fred Warlick and another Local officer requested reimbursement for time spent on Local 1715 business for which the Local had not given prior approval. Defendant Hardin, however, ordered the Plaintiff to pay those claims.

On June 28, 1983, the Plaintiff met with Defendant K. R. Moore, Vice President of the Union, to determine whether the Union planned to continue to enforce dual policies with respect to expense payments by denying his appeal for reimbursement. The Plaintiff claims that Defendant Moore refused to discuss the matter.

On July 1, 1983, the Plaintiff's attorney wrote to Defendant Hardin complaining about the $1,210.20 repayment the Plaintiff was required to make to the Union after the audit as a result of the different standards allegedly

applied to the Plaintiff and other Union members with regard to payment of Union expenses. He asserted that the heart of the conflict involved Local President Warlick's actions to harass the Plaintiff for not supporting his views, and that if the Union supported Warlick in those efforts, it would be in violation of 29 U.S.C. § 411.

On July 22, 1983, Defendant Hardin responded to the Plaintiff's attorney, stating that the issue concerning the time disallowed as a result of the audit had been considered closed once the Plaintiff had made his repayment to the Union.

On August 2, 1983, the Plaintiff's attorney sent Defendant Hardin another letter, in which he reported that he had advised the Plaintiff of Hardin's response concerning his request for reimbursement. He also informed Defendant Hardin that he had advised the Plaintiff "to commence litigation on or about September 15, 1983, unless the Union has properly reviewed and reconciled this matter." Letter dated August 2, 1983 from John Gresham, Esq. to Union President Hardin.

The Plaintiff filed this action on August 2, 1985, exactly two years after his attorney's last letter to Defendant Hardin. In his Complaint, the Plaintiff raises claims under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA") as well as pendent state implied contract and quantum meruit claims. Specifically, the Plaintiff claims that the Defendants have violated the Plaintiff's rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper disciplinary action under Title

I of the LMRDA, 29 U.S.C. § 411.[1] He claims that the selective application of the "prior approval" policy to disallow his claims was meant to punish him for speaking out against Local President Warlick, whose claims for reimbursement were not denied despite his failure to obtain prior approval for his "time lost." He also claims that the Defendants have not properly exercised their fiduciary duties as officers of the Union pursuant to Title V of the LMRDA, 29 U.S.C. § 501.[2]

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1 The relevant text of § 411 provides:

> (2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> (5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(2), (a)(5).

2 The relevant text of § 501 provides:

> (a) Duties of officers; exculpatory provisions and resolutions void. The officers, agents, shop stewards, and

(Continued on following page)

Whether the Court may entertain the Plaintiff's claim under § 411 of Title I of the LMRDA depends on whether that claim has been brought in a timely fashion. Because Congress has not explicitly provided a limitations period for such claims, the Court must "borrow" the most appropriate statute of limitations from some other source.

The last Fourth Circuit case to address the issue of what statute of limitations to apply to a claim under § 411 of the LMRDA was *Howard v. Aluminum Workers International Union*, 589 F.2d 771 (4th Cir. 1978). In *Howard*, the Fourth Circuit noted that courts "have found that denial of free speech is similar to a personal injury under state law and have applied tort limitations statutes to such claims." *Id.* at 774. Accordingly, the Court determined that Virginia's two-year statute of limitations for per-

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(Continued from previous page)

> other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.
>
> 29 U.S.C. § 501(a).

sonal injury claims should apply to the Plaintiff's claim that his union had abridged his right of free speech guaranteed by Title I of the LMRDA.

Since *Howard* represents the Fourth Circuit's last word on the appropriate limitations period for actions bought under Title I of the LMRDA, the Plaintiff contends that this Court is bound to apply North Carolina's three-year statute of limitations for personal injury actions. The Defendant, on the other hand, relies on the Supreme Court's more recent opinion in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and its progeny and argues that the Court should apply the six-month limitations period of Section 10(b) of the National Labor Relations Act for unfair labor practices charges to the Plaintiff's LMRDA Title I claim.

The task before the Court in *DelCostello* was the selection of an appropriate statute of limitations for a "hybrid" action combining (1) a union member's claim against his employer under § 301 of the Labor Management Relations Act for violation of a collective bargaining agreement, and (2) his claim against his union for breach of its implied duty of fair representation in its handling of his grievance against the employer. The Court stated at the outset of its opinion that it has "generally concluded that Congress intended that the courts apply the most closely analagous statute of limitations under state law" when federal law fails to provide explicitly for a limitations period for a federal action. *Id.* at 158. The Court noted, however, that "[i]n some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those in-

stances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *Id.* at 172.

The Court proceeded to reject the state statutes of limitations suggested by the parties because they provided imprecise analogies to the claims in the hybrid action and failed to accommodate the policy considerations underlying the hybrid action. The Court found the usual ninety-day statute of limitations for the vacation of arbitration awards to be too short to provide an employee with a "satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. On the other hand, the Court determined malpractice limitations periods, varying from three years to ten years, to be too long in light of the strong federal interest in speedy resolution of suits involving the grievance and arbitration procedures of a collective bargaining agreement. *Id.* at 168-69. The Court adopted instead the six-month limitations period of § 10(b) of the National Labor Relations Act, "a federal statute of limitations actually designed to accommodate a balance of interests very similar to those at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels." *Id.* at 169.

In deciding to apply § 10(b)'s six-month period to the hybrid action, the Court first noted that a "substantial overlap" often exists between claims against a union for breach of its duty of fair representation, against an employer for breach of a collective bargaining agreement, and unfair labor practice charges. It found that "fair representation claims are allegations of unfair, arbitrary, or

discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions." *Id.* at 170. It further stated that "it may be the case that alleged violations by an employer of a collective bargaining agreement will also amount to unfair labor practices." *Id.*

Even more important to the Court in its decision to adopt § 10(b)'s limitations period was the close similarity of the policy considerations relevant to the choice of a limitations period for unfair labor practice charges and for hybrid § 301/fair representation actions. The Court observed:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . . agreement and the private settlement of disputes under it.' *Hoosier*, 383 U.S. at 702. Accordingly, 'the need for uniformity' among procedures followed for similar claims, *ibid.*, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adaptation of § 10(b) of the NLRA as the appropriate limitations period for [hybrid § 301/fair representation lawsuits]."

Id. at 171 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring)).

The Supreme Court did not, however, intend to create an all-embracing new rule to be applied whenever an action involving a labor dispute lacks a congressionally enacted statute of limitations. The Court stressed that

> our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. *See, e.g., Mitchell,* 451 U.S., at 61, n. 3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.

DelCostello, 462 U.S. at 171.

Consistent with this cautionary language, the Supreme Court in *DelCostello* did not disturb its holding in *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), that the six-year state statute of limitations governing contracts should be applied to an action under a collective bargaining agreement brought by a union against an employer. The Court noted that in *Hoosier* it had resisted the suggestion to establish a uniform federal period of limitations for such lawsuits despite its recognition that suits involving labor-management relations ordinarily call for uniform law. The *DelCostello* Court explained its decision in *Hoosier* by stating:

> [W]e reasoned that national uniformity is of less importance when the case does not involve "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it," 383 U.S., at 702. We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case.

DelCostello, 462 U.S. at 163.

Since *DelCostello,* the circuits have split on the issue whether § 10(b)'s six-month limitations period should be extended to a union member's LMRDA Title I claims against his union. The Sixth and Seventh Circuits have determined in a conclusory fashion that the factors guiding the Supreme Court's choice of a limitations period for the hybrid action in *DelCostello* apply with equal force in the context of an LMRDA claim and, therefore, subjected the LMRDA claims before them to the same six-month limit. *See Adkins v. Electrical Workers,* 769 F.2d 330, 335 (6th Cir. 1985); *Vallone v. Local Union No. 705, International Brotherhood of Teamsters,* 755 F.2d 520, 521-22 (7th Cir. 1984).

The Third Circuit reached the same conclusion after a more detailed analysis in *Local Union 1397 v. United Steelworkers,* 748 F.2d 180 (3rd Cir. 1984). Following the analysis used in *DelCostello,* the Court first found that Title I of the LMRDA and the NLRA provisions governing unfair labor practices bear a "family resemblance" since they "are both addressed to the same basic concern: the protection of individual workers from arbitrary actions by unions . . . ." *Id.* at 183.

It was the perceived similarity in policy considerations underlying the choice of a limitations period for LMRDA claims and unfair labor practice charges, however, that convinced the Third Circuit to apply § 10(b)'s six-month period. The Court found that, while a union

member needs sufficient time to vindicate his rights under the LMRDA, "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's activities and effectiveness in the collective bargaining arena." *Id.* at 184.

As a final point, the Third Circuit expressed its opinion that a six-month limitations period for LMRDA claims would not be inherently unfair to union members. It noted that LMRDA Title I violations are rarely latent, and thus the aggrieved union member should be able to decide whether to sue within six months of the time the cause of action arises. The Court believed in essence that if the Supreme Court thought six months was enough time for filing a § 301 claim, the imposition of a six-month limit for filing an LMRDA claim would likewise be fair. *Id.*

Although ultimately adopting the result reached by the Third Circuit in *Local Union 1397*, the Eleventh Circuit in *Davis v. United Automobile Aerospace, and Agriculture Implement Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, — U.S. — (1986), revealed certain weaknesses in the Third Circuit's reasoning. With regard to the adequacy of a six-month period for filing an LMRDA Title I claim, the Eleventh Circuit noted a potential practical problem that could preclude the aggrieved union member from perfecting his LMRDA claim. The Court explained:

> A cause of action under section 411 accrues when the plaintiff union member discovers, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged violations, at which time the statute of limitations begins to run. However, section 411(a)(4) provides that a union member may be required to exhaust reasonable internal union procedures for up to four months before proceeding with a suit under section 412. Thus, union members might be forced into a "Catch-22" situation in which they could be barred from suing the union if they wait to sue for more than six months while exhausting union remedies, but could be dismissed from federal court for failure to exhaust internal remedies if they file suit within the limitations period without seeking to exhaust.

Id. at 1515 n.13.

More significant to the issue whether the reasoning of *DelCostello* compels application of § 10(b)'s limitations period to LMRDA Title I claims is the Court's rejection of the Third Circuit's conclusion that rapid resolution of a union member's LMRDA grievance against his union is necessary to maintain the federal goal of stable bargaining relationships. The Court found that the link between dissension within a union and the union's effectiveness in the collective bargaining arena "appears rather tenuous in the situation of a single dispute between an individual union member and the union." *Id.* at 1514 n.11. Indeed, the Court flatly disagreed with the Third Circuit's appraisal that the same policy considerations underlying the choice of a statute of limitations for unfair labor practices are present in an LMRDA Title I suit. The Court stated:

> [W]e note an important distinction between the present action and a hybrid § 301/fair representation claim as was alleged in *Del Costello*.
>
> . . . .

> The present action, alleging a violation of statutorily-protected free speech, involves a different balance of interests [than did the hybrid action in *DelCostello*]. First, an action alleging a violation of 29 U.S.C. § 411 is brought only against the union; the employer is not involved. Therefore, the national interests in stable labor-management bargaining relationships and the speedy, final resolution of disputes under a collective bargaining agreement are not implicated. Accordingly, the need for national uniformity in the application of limitation periods to such an action is not as great. *See DelCostello*, 108 S.Ct. 15 2289; *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). Furthermore, a union member's interest in protection against the infringement of his rights of free speech rises to a national interest, as embodied in section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), and thus seems of greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement.

Id. at 1514 (footnote omitted).

Despite its recognition of these policy arguments against extending § 10(b)'s six-month limitations period to LMRDA Title I claims, the Eleventh Circuit felt "constrained by the rationale of *DelCostello* and the holdings of our sister circuits to reach the same conclusion in the present case." *Id.* The Court stated that it felt bound by the fact that the Supreme Court had found a strong connection between the national interest in labor peace and the necessity for a short time period in which to bring an action based on a labor union's implied duty of fair representation to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members under Title I of the LMRDA. *Id.*

It is true that the Supreme Court in *DelCostello* identified the federal policy in favor of "relatively rapid final resolution of labor disputes" as a reason for rejecting the suggested three- to nine-year malpractice statute of limitations for the fair representation claim against the union. *DelCostello*, 462 U.S. at 168. This Court notes, however, that what the Supreme Court may consider "relatively rapid" in one type of labor dispute may be different from what may satisfy that policy in another context. In *DelCostello*, the Court mentioned the "rapid resolution" policy in the context of its discussion of the need for speedy and final resolution of disputes that may involve the interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union. *Id.* at 169. In *Auto Worker v. Hoosier*, *supra*, however, the Court specifically found that the federal goal of "relatively rapid disposition of labor disputes" suggested by § 10(b)'s six month provision would be satisfied by application of a *six-year* statute of limitations in the context of a § 301 action by a union against an employer for a straightforward breach of a collective bargaining agreement. *Hoosier*, 383 U.S. at 707. In any event, this Court does not agree with the Eleventh Circuit's sudden conclusion that the Supreme Court's concern over the speedy resolution of the fair representation claim in *DelCostello* automatically mandates as speedy a resolution when the suit is based on a dispute under Title I of the LMRDA.

The First Circuit recently issued a thorough and well reasoned opinion in *Doty v. Sewall* 784 F.2d 1 (1st Cir. 1986), in which it refused to follow its sister circuits in their extension of the result in *DelCostello* to actions

brought solely against a union for a violation of Title I of the LMRDA. After examining the reasoning and cautionary language of *DelCostello* the Court "dr[e]w the clear conclusion that *DelCostello* is not the kind of precedent that lends itself as a springboard for easy application to other rights, statutes and policies. Rather, it is a closely reasoned exception to a general rule which illumines a rather narrow path." *Id.* at 6. It further stated that its

> own scrutiny of the interests and policies at stake in this [LMRDA Title I] case convinces us that they so differ from those in *DelCostello* that its underlying approach mandates adherence in this case to the normal mode of applying "the most closely analogous statute of limitations under state law." 462 U.S. at 158.

Id. at 2.

Specifically the First Circuit found from the legislative history of the LMRDA that Title I, which was designated a "bill of rights" akin to that in our federal constitution, was enacted to protect a union member's civil and political rights as opposed to his economic rights. Thus, whereas the labor-management relationship is the core of the NLRA and the hybrid § 301/fair representation claim, the individual's interest in internal union democracy is at the heart of Title I of the LMRDA. The Court drew from the legislative history "the sense that claims under Title I's bill of rights provisions were viewed primarily as civil rights matters rather than as labor matters." *Id.* at 8. It, therefore, believed that deriving a statute of limitations for pure Title I LMRDA claims from a state statute governing civil rights actions would be more logical than borrowing one from an unfair labor practices statute.

Accord McQueen v. MaGuire, No. 82 Civ. 8445 (PNL), Slip Op. (S.D.N.Y. March 11, 1986); *Bernard v. Delivery Drivers* 587 F. Supp. 524 (D. Colo. 1984).

Like the Eleventh Circuit, the First Circuit also determined that an LMRDA bill of rights claim does not implicate the same underlying policy concerns found in *DelCostello.* Such a claim cannot be asserted against an employer; does not challenge the stable bargaining relationship between the union and the employer; and does not affect the interpretation of a collective bargaining agreement. In addition, when a union member is suing only for breach of his "civil rights" under Title I of the LMRDA, there is no attack on a private settlement under a collective bargaining agreement. The Court thus concluded that "the interests served by a rather short statute of limitations in *DelCostello,* stable labor-management relationships and finality in privately grieved and arbitrated settlements, are virtually, if not entirely, absent in the case at bar." *Id.* at 7.

In contrast, the Court found that the interest of the union member is "qualitatively enhanced" in an LMRDA Title I case. The rights asserted in a Title I case were created by Congress in a specific statute modeled after the federal Bill of Rights. *Id.* at 7; *see also United Steelworkers v. Sadlowski,* 457 U.S. 102, 108-111 (1982). Thus, the union member's interest represents a national policy. The Court noted that there are no such specifically identified rights in a hybrid claim. Furthermore, the Court found that the objective of Title I is to increase union democracy, whereas the objective sought in the typical hybrid case is a purely personal victory in the form of

restoration of job, pay, or promotion." *Id.* at 9. The Court concluded that the "sorts of interests protected by the LMRDA make it inappropriate to limit suits under that act without a compelling reason." *Id.* at 9. *Accord McQueen v. Maguire,* No. 82 Civ. 8445 (PNL) Slip Op. (S.D.N.Y. March 11, 1986) ("a very short limitations period [for LMRDA bill of rights claims] would be justified only in the face of an overwhelming national interest in speedy resolution of the suit"): *Rodonich v. House Wreckers Union Local 95,* 624 F. Supp. 678, 682 (S.D.N.Y. 1985) ("Although the rapid resolution of labor disputes serves an important national policy, its urgency is not so great when the result of applying the six-month statute might be to thwart the Congressional purpose in enacting the LMRDA, which was to provide union members with a 'bill of rights.'"): *Rector v. Local Union No. 10,* Civil No. 4-85-1142, Slip Op. at 11, 12 (D. Md. October 31, 1985) ("The importance of [a union member's "bill of rights"] in our legal system should lead us to give union members every opportunity to vindicate those rights, instead of searching out a short period of limitations . . . . Federal labor law should not be procedurally determined to resolve LMRDA claims quickly in a vain attempt to protect unions from diversity. Congress had precisely the opposite intent in mind when it wrote the LMRDA.")

The Second Circuit's interpretation of the reach of *DelCostello* also advises against adopting § 10(b)'s six-month limitations period for LMRDA Title I claims. While arguing that *DelCostello* need not be narrowly construed to apply only to claims identical to those in *Del Costello,* the Second Circuit in *Robinson v. Pan American World Airways, Inc.,* 777 F.2d 84 (2d Cir. 1985), adhered

to its earlier view expressed in *Monarch Long Beach Corp. v. Soft Drink Workers Local 812,* 762 F.2d 228 (2d Cir. 1985), *cert. denied,* — U.S. —, 106 S.Ct. 569 (1986), that *DelCostello* is inapplicable to actions which do not involve an immediate and direct impact on labor-management relations. It stated that in determining whether *DelCostello* should be applied in a labor-related matter, "the key question is whether the dispute arises out of a labor-management relationship in which uniform and speedy settlement is highly desireable." *Id.* at 89.

Obviously, a union member's LMRDA Title I claim does not arise out of a labor-management relationship, but rather out of the union member's relationship with his union. It impacts only tangentially, if at all, on the union's bargaining relationship with the employer. Further, the Supreme Court noted in *DelCostello* that national uniformity is of less importance when the case does not involve "'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it.'" *DelCostello, supra,* 462 U.S. at 162-163 (quoting *Hoosier,* 383 U.S. at 702). A Title I LMRDA suit such as the one presently before this Court does not implicate "those consensual processes," so application of a uniform federal limitations period is not as crucial a concern as it was in *DelCostello.*

The Court further believes that the Eleventh and First Circuits have aptly demonstrated that LMRDA Title I actions do not involve the same policy considerations that compelled the Court to adopt a rather short limitations period in *DelCostello.* Finally, the Court agrees

with the First Circuit that an LMRDA Title I claim more closely resembles a civil rights claim than an unfair labor practice charge and that it is, therefore, more appropriate to borrow a statute of limitations applicable to a civil rights action than one that governs unfair labor practice charges.

Thus, having reviewed the precedents from other circuits on the propriety of extending *DelCostello* to actions based on a union member's LMRDA Title I claim against his union, the Court is of the opinion that the sounder position is to decline to apply § 10(b)'s six-month limitations period to the Plaintiff's LMRDA Title I claim. Instead, the Court will apply North Carolina's three-year limitations period for personal injury actions under N.C. Gen. Stat. § 1-52 since that statute would apply to a federal civil rights action. *See Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938 (1985) (state statutes of limitations for personal injury actions should apply to federal civil rights actions). This result is in accord with the Fourth Circuit's pre-*DelCostello* disposition of the LMRDA statute of limitations problem in *Howard v. Aluminum Workers International Union and Local*, 589 F.2d 771, 774 (4th Cir. 1978). Thus, the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, since he filed it within three years of the time the cause of action arose.

Because the circuits are divided on this statute of limitations issue, however ,the Court recognizes that there is substantial ground for difference of opinion with its ruling on the timeliness of the Plaintiff's LMRDA Title I claim. Since the resolution of the limitations issue involves a controlling question of law which cou'd dispose

of the Plaintiff's LMRDA Title I claim, an immediate appeal may materially advance the ultimate termination of the litigation of that claim. Therefore, the Defendants are entitled to apply to the Fourth Circuit Court of Appeals for an interlocutory appeal of this ruling within ten days of the entry of this Order pursuant to 28 U.S.C. § 1292(b).

Since the Court has determined that the Plaintiff's LMRDA Title I claim should not be dismissed as untimely, it must consider the Defendants' alternative argument that the claim should be dismissed because the Plaintiff failed to exhaust his internal union remedies pursuant to 29 U.S.C. § 411(a)(4).[3] The Defendants argue that President Hardin's unfavorable response to the Plaintiff's request for reimbursement could have been appealed to the Board of Directors of the Union pursuant to Article 75, II of the Union Constitution if the Plaintiff had not procrastinated in asserting his claims. That article of the Union Constitution provides:

> A member or subordinate body may appeal to the Board of Directors from an interpretation of this Constitution made by the International President, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date the decision by the International President was made.

UTU Constitution, Article 75, II.

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[3] 29 U.S.C. § 411(a)(4) provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . . Provided, that any such member be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal . . . proceedings against such organizations or any officer thereof . . . .

The Plaintiff contends that Article 75, II does not apply in this case since it covers only appeals from the President's interpretation of the Union's Constitution. The Plaintiff has never sought an interpretation of the Constitution from President Hardin. Since the claim involves matters of internal regulation and not matters of constitutional interpretation, the Court finds that the Plaintiff did not have a right to appeal President Hardin's decision under the provision cited by the Defendants. As the Defendants have shown the Court no other internal remedies that were available to the Plaintiff, there appears to be no valid basis for their argument for dismissal because of failure to exhaust union remedies.

The Defendants also seek dismissal of the Plaintiff's claim under Title V of the LMRDA, 29 U.S.C. § 501, for failure to state a claim upon which relief may be granted. The Defendant contends that the Plaintiff cannot allege or prove that they did anything other than hold the Union's money and property solely for the benefit of the organization as required by § 501(a) in making the Plaintiff reimburse the Local's treasury $1,210.20, the amount disallowed as a result of the audit. Indeed, the Defendants contend that they might have been dangerously close to failing to comply fully with the spirit of § 501(a) had they not required such reimbursement after the membership complaint and audit.

The Court notes initially that the Plaintiff's Complaint does not state a claim under § 501 against the Defendant Union. That section provides for an action to be taken against an "officer, agent, shop steward, or representative of any labor organization." 29 U.S.C. § 501(b).

It does not provide for suit against the labor organization itself. *Stelling v. International Brotherhood of Electrical Workers*, 587 F.2d 1379, 1386 n.6 (9th Cir. 1978); *Pignotti v. Local # 3, Sheet Workers' International Association*, 477 F.2d 825, 832 (8th Cir.), *cert. denied*, 414 U.S. 1067 (1973).

While § 501(a) provides the substantive basis for a claim based on a union officer's breach of his fiduciary duties, § 501(b) sets forth the procedural requirements that must be met before a union member may maintain an action for a violation of § 501(a). Specifically, § 501(b) provides:

> When any officer, agent, shop steward or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or[4] recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of court obtained upon verified application and for good cause shown, which application may be made ex parte.

29 U.S.C. § 501(b). Thus, the Plaintiff must meet two statutory condition precedents before he may maintain

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[4] The "or" has been consistently construed to mean "to." *Dinko v. Wall*, 531 F.2d 68, 72 n.4 (2d Cir. 1976).

his action against the Defendants: (1) the Plaintiff must have unsuccessfully demanded that the union or its governing board or officers bring the action; and (2) the Plaintiff must secure court permission to bring the action by filing a verified application with the court showing good cause. Further, the Plaintiff must be seeking relief on behalf of the union rather than on his own behalf. Because § 501(b) extends the jurisdiction of federal courts, its requirements are to be narrowly construed "so as not to reach beyond the limits intended by Congress." *Phillips v. Osborne*, 403 F.2d 826, 828 (9th Cir. 1968).

In his Complaint, the Plaintiff alleges that he "appealed the rejection of his [lost time] claims to defendant Hardin who rejected the appeal," that he "sought to further appeal the rejection of his claim through defendant Moore," and that "the appeal was denied with no explanation." Complaint ¶¶ 9, 10. These allegations show that the Plaintiff brought his personal grievance regarding his reimbursement to the attention of Hardin and Moore, but they hardly establish a demand that an action be brought to cure alleged breaches of fiduciary obligations by Hardin, Moore, and McKinney. "Failure to allege that the required request has been made has been held to require denial of leave to file the complaint." *Flaherty v. Warehousemen, Garage & Service Station Employees' Local Union No. 334*, 574 F.2d 484, 487 (9th Cir. 1978). Even if the Court were to consider the letters to President Hardin from the Plaintiff's attorney, which were filed with the Court by the Defendants in support of their Motion to dismiss, it would still reach the same conclusion that the Plaintiff failed to meet the demand requirement of § 501(b). *See Agola v. Hagner*, 556 F. Supp. 296, 301 (E.D.N.Y. 1982) (union members' letter to union demanding support of union during strike, notifying union that strike benefits were behind in payment and had apparently been ceased, and threatening to institute legal action should union not respond and give its support by a certain date held insufficient to satisfy demand requirement of § 501(b)).

In the present case, the Plaintiff has never requested leave of court to file his Complaint as required by § 501(b). The "leave of court" requirement is designed to protect union officials from harassing, vexatious litigation. *Morrissey v. Curran*, 423 F.2d 393 (2d Cir. 1970). The Complaint that was filed was not verified, so it cannot even be treated as a proper application for leave of court to proceed with the suit. The Plaintiff did file an affidavit in response to the Defendants' Motion to dismiss or for summary judgment over five months after he filed his Complaint. That affidavit, however, does not include sufficient allegations that he demanded that an action be brought against the present Defendants for breaches of their fiduciary obligations to the organization.

Most significantly, the Plaintiff's Complaint is defective in that it does not seek relief "for the benefit of the labor organization." 29 U.S.C. § 501(b). As noted by the Ninth Circuit in *Phillips v. Osborne*, 403 F.2d 826, 831 (9th Cir. 1968), Congress apparently turned to the concept of the shareholders' derivative suit when designing the procedures by which union members could fulfill their "policing functions" within their labor organization. The Ninth Circuit elaborated on the nature of such a suit by stating:

> The basic principle of the derivative suit is that the duties allegedly violated by corporate officers are owed to the organization and only secondarily or derivatively to the shareholder as representative of all shareholders.
>
> .....
>
> In the derivative context, a necessary corollary of the principle that the duties of officers are owed to the organization is that any relief obtained by the plaintiff in such litigation shall benefit the corporation as a whole and not the suing individual directly. Correspondingly, Section 501(b) makes it clear that relief granted under Section 501 is for the benefit of the real party in interest, the union whose officers are charged with dereliction.

Id. at 831.

The Plaintiff obviously has not brought this suit on behalf of the Union, but rather for his own benefit. The Court notes that the Plaintiff seeks reimbursement of the money disallowed him for "time lost" because of an alleged "prior approval" policy applied against him. Although he alleges in his Complaint that the Defendants subsequently required him to pay claims of other union members in contravention of the "prior approval" policy, his prayer for relief does not include a request that the Defendant be enjoined to require repayment to the Union of expenses paid to those other union members in the event such a policy in fact does exist. He simply seeks vindication of his own right to the money that he was required to repay and a declaration that the Defendants' conduct was unlawful.

Because the Plaintiff has not satisfied the requirements of § 501(b), his claim pursuant to § 501(a) should be dismissed.

Finally, the Defendants seek dismissal of the Plaintiff's state law quantum meruit and implied contract claims on the ground that they are barred by the federal doctrine of preemption since they arise out of the same actions he alleges constitute violations of the LMRDA. 29 U.S.C. § 413 explicitly provides, however, for retention of the rights of union members under state law:

> Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law . . . .

29 U.S.C. § 523 contains similar language which negates the Defendants' contention that the Plaintiff's state law claims are preempted by Title V of the LMRDA. Therefore, the plaintiff's pendent state law claims should not be dismissed.

NOW, THEREFORE, IT IS ORDERED that:

(1) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. § 411 is *DENIED;*

(2) Because the Court is satisfied that its ruling on the timeliness of the Plaintiff's claim under 29 U.S.C. § 411 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this ruling may advance the ultimate termination of the litigation, the Defendants may apply to the United States Court of Appeals for the Fourth Circuit within ten (10) days of the date this Order is filed for permission to appeal this ruling pursuant to 28 U.S.C. § 1292(b);

(3) The Defendants' Motion to dismiss the Plaintiff's claim pursuant to 29 U.S.C. § 501 is *GRANTED;*

(4) The Defendants' Motion to dismiss the Plaintiff's state law claims is *DENIED;* and

(5) Should the Defendants apply for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), that application shall stay all proceedings in this Court.

This the 30th day of April, 1986.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT
JUDGE

(Certificate of Service omitted in printing)

No. 87-1031

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED*

Should the Court deviate from the normal practice of borrowing the most analogous state limitations period and apply the six-month limitations period for filing charges under the National Labor Relations Act to a free speech claim brought under Title I of the Labor-Management Reporting and Disclosure Act?

* In addition to the parties listed in the caption, Fred A. Hardin, K. R. Moore and J. L. McKinney appear as respondents.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes

Treatises

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals is reported at 828 F.2d 1066

(4th Cir. 1987), and appears at pages 48a - 70a of the Appendix to the Petition for Writ of Certiorari. ("Pet. App. 48a - 70a") The District Court's Order denying Summary Judgment and staying proceedings pending interlocutory appeal is reported at 633 F.Supp. 1516 (W.D. N.C. 1986), and appears in pertinent part at Pet. App. 1a - 45a. The District Court opinion and order appears in its entirety at pages 42 through 68 of the Joint Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on September 17, 1987. The Petition for Writ of Certiorari was filed on December 16, 1987, and was granted on March 7, 1988. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action involves rights protected by 29 U.S.C. § 411(a)(2) which reads in pertinent part:

> Every member of any labor organization shall have the right to meet or assemble freely with other members; and to express any views arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting . . . .

The action is brought pursuant to 29 U.S.C. § 412 which provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal

office of such labor organization is located.

At issue in the case is the applicability of 29 U.S.C. § 160(b) which reads in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

STATEMENT OF THE CASE

A. Facts

Petitioner G. P. Reed works in the body shop of the local bus company in Charlotte, North Carolina. The bus company's employees are represented in collective bargaining by Local 1715 (the "Local") of respondent United Transportation Union ("UTU"). Beginning in 1967, and continuing through the time this action was filed, petitioner served as the elected Treasurer/Secretary of the Local. Petitioner, like a number of the Local's officers, received a small monthly salary from the Local. However, because their union duties sometimes require union officers to take time off from work without pay, petitioner and other union officers received, in addition to their

salaries, reimbursement by the Union for such lost time.

The dispute in this case followed several heated disagreements over union policy between petitioner and Fred Warlick, the Local's General Chairman. Several weeks after a particularly heated disagreement in August of 1982, petitioner was notified that respondent J. L. McKinney would conduct an audit of the Local's books and records maintained by petitioner. J. A. 28-29. As a result of this audit UTU demanded that Reed return $1,210.20 in payments which he had received for extra time he had spent on union business. Although the Local had approved these payments to Reed, respondent McKinney maintained that petitioner had followed incorrect procedures in obtaining this approval

of payments to him.[1] J. A. 29. In addition, another union member who had expressed concern that he too might be required to return lost time payments was reassured by Telphia Beatty, the Vice Chairman of the Local, that he need not worry because "they were after" petitioner Reed. J. A. 36. Indeed, in the letter prepared at respondent Moore's request setting up the audit of the Local's books, the chief auditor told respondent McKinney that Warlick and petitioner had "a feud going" and that Reed was criticizing Warlick to union members for "spending too much money". Respondent McKinney's

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1 Consistent with past practice, petitioner had obtained the Local's approval for reimbursement before the money was paid, but after having taken time off from work. Respondents asserted that petitioner should have obtained union approval before taking time off.

instructions were to "take care of the assignment". J. A. 28-30.

Petitioner appealed from the repayment order. On October 1, 1982, respondent Hardin, a political ally of Warlick, denied the appeal. J. A. 33. After this appeal, evidence continued to surface which showed that petitioner Reed had indeed been subjected to singular adverse treatment because of his opposition to respondent Warlick. When petitioner sought to apply the same policy and withhold lost time payments from other union officials who had not precleared their "lost time" prior to taking it, he was ordered to make the payments. J. A. 30. Respondent Hardin's only explanation for this difference in treatment has been that the payments

to others are not "costly items".[2]

B. Proceedings Below

On August 2, 1985, petitioner commenced this action in the United States District Court for the Western District of North Carolina. He raised claims under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et. seq. ("LMRDA") as well as pendent state contract and quantum meruit claims. With regard to his LMRDA count, Reed claimed that respondents had violated his rights to freedom of speech and assembly as a union member as well as his right to be safeguarded from improper

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2 Although this discrimination against petitioner continued until 1985, petitioner would be unable to sue to recover the $1,201.20 that he was required to repay in 1982 if the six-month limitations period is upheld.

disciplinary action. He claimed that the selective application of a "prior approval" policy to disallow his claims for services rendered to the union was meant to punish him for speaking out against the policies and practices of General Chairman Warlick. In addition, petitioner raised claims under 29 U.S.C. § 501 that are no longer at issue.

The respondents filed a motion to dismiss the complaint or in the alternative for summary judgment, on the ground that the complaint was untimely. The trial court determined that the appropriate limitations period for a Title I claim was the three-year North Carolina statute governing personal injury and entered an order denying the respondents' motion to dismiss with regard to the 29 U.S.C. § 411 and the pendent state claims. The court certified the case

for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed the proceedings pending resolution on appeal.

The primary issue raised by the respondents in the court of appeals was again whether the six-month statute of limitations provided by § 10(b) of the NLRA, 29 U.S.C. § 160(b), applied to a freestanding LMRDA "Bill of Rights" claim. While the trial court had rejected this argument, the court of appeals granted the interlocutory appeal and reversed. Reed v. United Transportation Union, 828 F.2d 1066 (4th Cir. 1987). In its opinion, the Fourth Circuit recited the conflicting opinions of the other circuits which had reviewed the issue subsequent to this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S.

151, 103 S.Ct 2281, 76 L.Ed.2d 476 (1983), adopted the reasoning in Steelworkers' Local 1397 v. United Steelworkers of America, 748 F.2d 180 (3rd Cir. 1984), which had held that the six-month limitation of § 10(b) of the NLRA applied to Petitioner's LMRDA claim, and concluded that Reed's LMRDA claim was untimely.

This Court granted certiorari on March 7, 1988.

SUMMARY OF ARGUMENT

The decision below should be reversed because, instead of taking to heart this Court's caution that the exception created in DelCostello "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law as elsewhere", DelCostello, 462 U.S. at 171, the court below disregarded that warning and improperly extended the

exception. Indeed, if the rationale used below to apply the six-month limitations period to a Title I claim was applied consistently, it would require the use of a similar limitations period for virtually all federal labor actions, thereby turning the exception into the general rule.

In DelCostello, this Court set out the relevant considerations which must be met before a court should depart from the practice of borrowing the most analogous state limitations. Given the longstanding nature of this practice, the federal courts have assumed that Congress, which is aware of this practice, intends to follow it when enacting legislation which includes no specific limitations period to a cause of action.

The limited exception to this general rule, which the Court

enunciated in DelCostello, has two parts with the second part again branching into two components. First, there must be "a rule from elsewhere in federal law [which] clearly provides a closer analogy than available state statutes." Second, "both the federal policies at stake and the practicalities of litigation [must] make that [federal] rule a significantly more appropriate vehicle for interstitial lawmaking". DelCostello, 462 U.S. at 172 (emphasis added).

Because the cause of action here satisfies neither part of the DelCostello exception, there is no reason to depart from the norm of borrowing state limitations of actions. First, with regard to the analogy aspect of the DelCostello standard, this Court has recognized that rights granted by Title I of the

LMRDA are modeled after and parallel the individual civil rights protected by the Federal statutes and the Constitution. United Steelworkers v. Sadlowski, 457 U.S. 102, 109-10 (1982); Finnegan v. Leu, 456 U.S. 431, 435-36 (1982). This Court has also recognized that the state statute of limitations governing personal injury claims is to be applied to such federal civil rights claims. Goodman v. Lukens Steel Company, ____ U.S. _____, 96 L.Ed.2d 572 (1987)(42 U.S.C. § 1981); Wilson v. Garcia, 471 U.S. 261 (1985)(42 U.S.C. § 1983).

The Court in Wilson specifically determined that this personal injury analogy is "persuasive". A civil rights violation is an injury to the person or to "the federal statutory rights which emanate from or are guaranteed to the person". Thus, a

violation of a civil right "results from personal injuries". Wilson, 471 U.S. at 278.

With regard to the second aspect of the DelCostello exception, both the federal policies at stake and the practicalities of litigation support the use of state personal injury limitations. These limitations periods, usually two to four years, far better accommodate both the federal policies underlying Title I and the practicalities of litigating a civil rights action than does the six-month administrative limitation contained in the NLRA. Burnett v. Grattan, 468 U.S. 42 (1984). As noted in Burnett, the dominant characteristic of civil rights actions is that "they belong in court" and that the practicalities of federal civil rights litigation require substantially longer

preparation time than is provided by a six-month administrative limitations period. Burnett, 468 U.S. at 50-51.

Thus, this Court's prior decisions indicate that the normal borrowing rule, not the DelCostello exception, should apply in this case.

ARGUMENT

A. THE DELCOSTELLO DEPARTURE FROM THE LONGSTANDING PRACTICE OF BORROWING LIMITATIONS PERIODS FROM STATE LAW IS AN EXCEPTION TO A WELL-ESTABLISHED RULE

Until this Court's decision in DelCostello, the only exception to the general rule that the analogous state statute of limitations was to apply to a federal civil claim was for the narrow class of cases where use of the state law would frustrate the federal policy embodied in the claim. Occidental Life Insurance v. EEOC, 432 U.S. 355 (1977). Accord,

McAllister v. Magnolia Petroleum Company, 357 U.S. 221, 226 (1958)(application of two-year statute of limitations to seaworthiness claim would diminish seaman's mandatorily joined Jones Act claim). See Holmberg v. Armbrecht, 327 U.S. 392 (1946)(the doctrine of laches rather than a state limitations period applies to federal equity action).

The Court recently has advanced several theoretical bases for the use of state statutes of limitations. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 158-62, 174-75 (opinions of Justice Brennan for the majority and Justice O'Connor, dissenting); Agency Holding Corporation v. Malley-Duff & Associates, ____ U.S. _____, 97 L.Ed.2d 121, 127-28 and 135-39 (1987)(opinions of Justice O'Connor

for the majority and Justice Scalia, concurring). All of these discussions recognize that the Court has a "longstanding practice of borrowing state law", that Congress is aware of the longstanding practice, and that Congress intends by its silence on a limitations period to allow the practice to continue.

DelCostello represented this Court's second attempt to establish the correct limitations period for a hybrid action combining the statutory § 301 claim, that the employer had breached a collective bargaining agreement, with the judicially-created claim that the union had breached its duty of fair representation. In Mitchell v. United Parcel Service, 451 U.S. 56 (1981), the Court determined that this hybrid action was best

characterized as one to vacate an arbitration award and that the appropriate limitations period was 90 days for the bringing of an action to vacate such an award. The Mitchell decision did not affect the Court's determination in Auto Workers v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966), applying the statute of limitations for unwritten contracts to a straightforward § 301 action by a union against an employer.

Justice Stewart, in his concurrence to Mitchell, pointed out several problems with the Court's result, which would later resurface in DelCostello. Initially, Justice Stewart noted that the hybrid § 301/unfair representation action in Mitchell, unlike the straightforward § 301 claim in Hoosier Cardinal, implicated the core component of

federal labor law, "the formation of the contractual agreement and the private settlement of disputes under the agreement." Moreover, Justice Stewart pointed out that while having discrete jurisdictional bases and different elements of proof, the § 301 claim against the employer and the duty of fair representation claim against the union were "inextricably interdependent." Mitchell, 451 U.S. at 66-67.

This Court in DelCostello recognized that the problems enumerated by Justice Stewart in his Mitchell concurrence were compounded by the fact that the conceptual differences between the § 301 claim and the duty of fair representation claim make it extremely difficult to find a close analogy in state law for a hybrid § 301/unfair representation action. DelCostello, 462 U.S. at

165. The alternative of applying different statutes of limitations to the individual claims did not take into account the practicalities of the hybrid § 301/unfair representation litigation, for under such an approach the use of the most analogous statute of limitations for the § 301 claim against the employer and separate use of the most analogous limitations period for the duty of fair representation claim against the union would have meant that a large part of the damages in most cases would have been uncollectible unless the hybrid action was brought within the shorter statute of limitations. DelCostello, 462 U.S. at 168.

Given these factors, the exception which DelCostello fashioned to the longstanding practice of borrowing state statutes of

limitations was narrowly tailored to the unique set of circumstances presented by the hybrid § 301/unfair representation action. Resort to state law remains the norm unless "a federal law clearly provides a closer analogy than available state statutes" and additionally, both the "federal policies at stake" and the "practicalities of litigation" make the federal rule "a significantly more appropriate vehicle for interstitial lawmaking". DelCostello, 462 U.S. at 172.

The federal limitations period for which the DelCostello exception was crafted was the six-month administrative limitation on the filing of unfair labor practice charges before the National Labor Relations Board (NLRB), which is found in § 10(b) of the National Labor Relations Act (NLRA).

This Court's acceptance of the § 10(b) limitations period as a closer analogy than possible state limitations was premised on the fact that breaches of the duty of fair representation were in most, if not all, cases also unfair labor practices. Thus, there was a substantial overlap of claims constituting both an unfair labor practice and a breach of the duty of fair representation, DelCostello, 462 U.S. at 170, and use of the § 10(b) limitation met the first element of the Court's test.

The second element was also satisfied since the six-month limitation of § 10(b) of the NLRA struck a reasonable balance between, on the one hand, the national interest in stable bargaining relationships and the finality of private settlements, and on the other

hand, the employee's interest in the hybrid § 301/unfair representation case to set aside unjust settlements. Additionally, the Court concluded that the § 10(b) limitation took into account the practical concern that the interdependent claims share a limitations period of suitable length. DelCostello, 462 U.S. at 171.

Although the federal limitations contained in § 10(b) of the NLRA fit the unusual exigencies of DelCostello, both the analysis in the opinion as well as the specific admonitions of the Court were clear: the holding in DelCostello was not to "be taken as a departure from prior practice in borrowing limitation periods for federal causes in actions in labor law or elsewhere . . . . Resort to state law remains the norm

for borrowing limitations periods." DelCostello, 462 U.S. at 171.

B. CLAIMS UNDER TITLE I OF THE LMRDA DO NOT FIT WITHIN THE NARROW EXCEPTION OF DELCOSTELLO OR THE SUBSEQUENT EXCEPTION OF AGENCY HOLDING CORPORATION

1. The Limitations Period of § 10(b) of the NLRA Does Not Clearly Provide a Closer Analogy Than Available State Statutes.

The initial inquiry regarding whether a Title I action should, like the hybrid action in DelCostello, be an exception to the general rule is whether federal law "clearly" provides a closer analogy than available state statutes. The court of appeals below, as well as the other courts that have extended DelCostello to Title I actions, have not focused on the specific analysis in DelCostello to determine if federal law clearly provides a closer analogy. Rather, they have seized on

this Court's passing reference that unfair representation claims bear a "family resemblance" to unfair labor practice claims to create a generalized "family resemblance" standard for determining the applicability of DelCostello to Title I claims. The leading decision applying the § 10(b) limitations found such a family resemblance between an unfair labor charge and a Title I action on the generalized notion that both are concerned with arbitrary actions by Unions. Local Union 1397 v. United Steelworkers, 748 F.2d 180, 183 (3rd Cir. 1984). The opinion of the court below contained a similar generalized notion of family resemblance. Reed, 828 F.2d at 1070.

The First Circuit had a succinct and dispositive response to this proposition:

> This, we feel, is to stretch the rubric of 'family' far beyond its sense in DelCostello, where the term was used to indicate a dramatic overlap of equivalency situations in which a charge of unfair representation breach of a collective bargaining agreement would 'also amount to' unfair labor practices'. The fact that because the NLRA and the LMRDA endeavor to protect workers from unfair treatment, they must be deemed to bear a 'family resemblance' is no more a unifying perception than the fact that both tort and contract law purport to protect against unreasonable actions.

Doty v. Sewall, 784 F.2d 1, 9-10 (1st Cir. 1986)(citations omitted).

The facile invocation of a family resemblance test to create the analogy between Title I actions and unfair labor practices under the NLRA also overlooks the historical development of federal labor law. Title I came into being because

Congress was dissatisfied with the failure of the NLRA, even as amended by the LMRA, to regulate internal union affairs and protect union members from undemocratic abuses by their leaders. See generally McAdams, Powers and Politics in Labor Legislation (1964). See also Boilermakers v. Hardeman, 401 U.S. 233, 237-41 (1971); Doty, 784 F.2d at 4. Indeed, the only cases which are covered by Title I and are also considered unfair labor practices under the NLRA are those in which the union causes a member to be discharged or otherwise injured by the employer. E.g., Murphey v. Operating Engineers Local 18, 774 F.2d 114, 123 (6th Cir. 1985). This convoluted and devious means of retaliating against a union member for exercising his right within the union is not the conduct at issue in

this case or most Title I cases.

While Congress had in mind the shortcomings of the NLRA when enacting Title I for the LMRDA, it chose not to adopt the limitations period of § 10(b). For the federal courts to now impose such a limitation on the basis of a strained "family resemblance" between the two claims would lead to a brand of judicial intrusion into the legislative process not anticipated by this Court in DelCostello or in Agency Holding Corporation v. Malley-Duff and Associates, _____ U.S. _____, 97 L.Ed.2d at 142.[3]

3 The duty of fair representation claim which was an element of the hybrid action in DelCostello was a judicially-created cause of action implied from the NLRA. Ford Motor Company v. Hoffman, 345 U.S. 330, 337-38 (1953). Thus, the court action in applying the § 10(b) limitation of the NLRA to the hybrid action does not constitute the kind (Continued on page 32)

Indeed, if there is any "family resemblance" here, the proper sibling to a Title I claim is not an unfair labor practice claim but rather a civil rights claim. Title I of the LMRDA is often referred to as the "Bill of Rights" for union members. The legislative history of Title I is replete with statements explaining the relationship between Title I and the Federal Bill of Rights. For instance, Senator McClellan noted that Congress "should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life." 2 NLRB, Legislative History of the Labor Management Disclosure and Reporting Act 1103 (1959). Toward the close of debate on the final

3 (Continued from page 31) of intrusion that a similar application to a Title I action would entail.

version of Title I, Representative Griffin emphasized that the rights protected by Title I "are hardly new or novel--they are the essential and fundamental rights which every American citizen is guaranteed in the Bill of Rights of the Federal Constitution". Id. at 1566.

This Court has likewise recognized that Title I rights are parallel to rights afforded by the Federal Constitution and that the Bill of Rights of the LMRDA provides a protection "necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of the memberships". Finnegan v. Leu, 456 U.S. 431, 435-36 (1982). The fact that Title I provides civil rights analogous to the rights protected by 42 U.S.C. § 1983 was recognized by

the courts of appeal well before the DelCostello decision. See, e.g., Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771, 774 (4th Cir. 1978). The cases which have correctly refused to expand the Delcostello exception have also placed LMRDA claims in the federal civil rights category and have applied state personal injury limitations. Rodonick v. House Wreckers Union Local 95, 817 F.2d 967, 977 (2nd Cir. 1987); Doty, 784 F.2d at 6. These decisions are consistent with this Court's recent decisions recognizing that state statutes of limitations governing personal injury are appropriately analogous to both 42 U.S.C. § 1981 and 42 U.S.C. § 1983. Goodman v. Lukens Steel, _____ U. S. _____, 96 L.Ed.2d 572 (1987); Wilson v. Garcia, 471 U.S. 261 (1985).

The Court in Wilson found this personal injury analogy "persuasive", for a civil rights violation is an injury "to the person" or to "the federal statutory rights which emanate from or are guaranteed to the person". Wilson, 471 U.S. at 278. Thus, a violation of a civil right "results from personal injuries". Id. Given the persuasive analogy of civil rights actions similar to those under Title I to personal injury actions, and the lack of a true "family resemblance" between the Title I action and the federal unfair labor practice claim, the first part of the DelCostello exception for departure from the norm of borrowing state limitations periods has not been satisfied. There is no federal rule that clearly provides a more analogous limitations period for a Title I claim.

2. The Federal Policies At Stake In A Title I Action Do Not Require Use Of The DelCostello Exception.

Likewise, neither the federal policies at stake in a Title I action nor the practicalities of Title I litigation make the six-month limitation of § 10(b) of the NLRA "a significantly more appropriate vehicle for the Court's interstitial law making."

The Congressional purpose in enacting Title I was to remedy the fact that unions were not adequately protecting vital non-economic interests of their members and that members needed protection from autocratic abuse by union officials. Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526, 536-37 (1984);

Doty v. Sewall, 784 F.2d 1, 4 (1st Cir. 1986). The courts of appeal that have applied the § 10(b) limitation to Title I actions, however, have given short shrift to the civil rights purpose of Title I. These courts have failed to identify any real impact that Title I actions have on the core federal policies embodied in both the LMRA and NLRA, the formation of the collective agreement and the private settlement of disputes under the agreement. Rather, they have simply found a "similarity in policy considerations [between] . . . . Title I actions and unfair labor practice charges." Local Union 1397 v. United Steelworkers, 748 F.2d 180, 183 (3rd Cir. 1984).

This conclusion is based on the generalized notion that "rapid resolution of internal union disputes

is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's effectiveness in the collective bargaining areas". Local 1397, 748 F.2d at 184. As both the First Circuit in Doty and the Eleventh Circuit in Davis have noted in response to this ipse dixit, "this link appears rather tenuous in the situation of a single dispute between an individual union member and the union." Doty, 784 F.2d at 10 (quoting Davis v. Automobile Workers, 765 F.2d 1510, 1514 n.11 (11th Cir. 1985)).

Certainly this case, presenting a freestanding claim that arises from disputes within the union and is in no way related to the formation of the collective bargaining agreement or to resolution of disputes under

the agreement, lends no support to the Local 1397 reasoning. The legislative history discussed earlier suggests that this is the type of claim which Title I is designed to remedy. While some of the issues giving rise to freestanding Title I claims, such as the use of union funds or the tactics and policies of union leadership, etc., may indirectly affect the way a union approaches the collective bargaining process, a similar indirect effect would result from every case brought against a union under any legal theory.

For example, challenges to union trusteeships under Title III of the LMRDA, are often related to disputes between a local and international union about bargaining matters. See, e.g., Roland v. Air Line Employees, 753 F.2d 1385 (7th Cir. 1985)(proper

purpose for trusteeships is to assure performance of bargaining agreements and bargaining duties). Yet Congress has included within Title III a presumption of proper motive for trusteeships during the first eighteen months of their imposition. This eighteen-month presumption indicates that Congress, having insured that union members are not in a position to effectively challenge a trusteeship until well after the six-month § 10(b) limitation has run, was aware that actions under Title III would be brought beyond the § 10(b) period.

Likewise, a civil rights action filed by a member against a labor union under 42 U.S.C. § 1981 may have an indirect impact on a union's position in the collective bargaining process; however, this Court has recognized that the appropriate

limitation for a § 1981 action is the state limitation for personal injury.

Thus, both Congress and this Court have recognized that a short six-month administrative limitations period is not needed to protect the collective bargaining process where the effect on the process is at most an indirect one brought about by a challenge to the internal action of the unions in violation of members' statutorily-protected rights.

There are situations where the union member may have both a hybrid § 301/unfair representation claim resulting from the manner in which the employee and the union engaged in a specific dispute resolution, as well as a Title I claim resulting from the fact that the union's disinterest in the grievance was by design to squelch protected activity within the union. Clift v.

International Union, UAW, 818 F.2d 623 (7th Cir. 1987); Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985); Vallone v. Local 705, International Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984). Similarly, there are times when a union member may seek relief under both a hybrid § 301/unfair representation claim and a claim of race or national origin discrimination where the failure to assist with a grievance had a discriminatory motivation. Henry v. Radio Station KSAN, 374 F.Supp 260 (N.D. Cal. 1974).

The fact that after DelCostello any union member who wishes to file an action combining his hybrid § 301/unfair representation claim with a claim under Title I, 42 U.S.C. § 1981 or Title VII of the 1964 Civil

Rights Act must do so within the limitations period for the hybrid claim does not suggest that the limitation for filing the other civil rights claims must be shortened. Rather, the policies underlying each of these claims, as well as the tangential impact each has on the federal policy to encourage collective bargaining and the private settlement of disputes under it, requires a separate analysis in determining the proper limitations period for each claim.

That the DelCostello exception was not to apply to every labor claim which even indirectly affected the collective bargaining process is highlighted by the fact that in DelCostello this Court specifically reaffirmed its holding in Auto Workers v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966). In

Hoosier Cardinal, the Court applied the statute of limitations for suits upon unwritten contracts to a suit brought by a union against an employer for violation of a collective bargaining agreement. Certainly the outcome of litigation involving the bargaining agreement itself may influence the way in which either party to the agreement bargains upon the contested issues in the future and may affect the relative strength of a party's position in the negotiation of future agreements. Yet DelCostello noted that, in applying a state statute of limitations, the court in Hoosier Cardinal had not implicated the "'consensual process'" defined as "'the formations of the collective agreement and the private settlement of disputes under it'". DelCostello, 462 U.S. at 163.

As with the § 301 claim in Hoosier Cardinal, the fact that some day in some way a union member's claim may affect collective bargaining falls far short of requiring imposition of the DelCostello exception to a Title I claim. Doty, 784 F.2d at 10.

Courts of appeal have reached a similar conclusion when considering the appropriate limitations period for actions under § 303 of the LMRA to enforce the secondary boycott provisions of the NLRA. Monarch Long Beach Corporation v. Teamsters Local 812, 762 F.2d 228, 231 (2nd Cir. 1985); Carruthers Ready-Mix v. Cement Masons Local 520, 779 F.2d 320, 325-27 (6th Cir. 1985). These courts rejected the DelCostello exception and applied longer limitations periods even though labor-management relations are directly affected by

such suits, and even though a secondary boycott, like the breach of duty of fair representation discussed in DelCostello, is an unfair labor practice. Nevertheless, these courts applied the DelCostello analysis to conclude that § 303 litigation did not have a sufficient impact on the bargaining relationship to warrant departure from the normal rule of borrowing state statutes of limitations.

In summary, important federal policy has led Congress to protect the vindication of a union member's civil and political rights with the passage of Title I. The prosecution of a Title I claim and the vindication of these rights have at most an indirect effect on the general federal labor policy to protect the formation of the collective agreement and the

settlement of disputes under it. Thus, a reconciliation of these federal policies does not require deviation from the norm of borrowing the appropriate state limitations period for the Title I claim.

3. The Litigation Practicalities Of A Title I Action Militate Against The Application Of The DelCostello Exception.

The practicalities of Title I litigation also militate against application of the DelCostello exception. In DelCostello the Court was faced with a situation where the appropriate state limitation as established by Mitchell generally required filing the hybrid § 301/unfair representation claim within ninety days. The DelCostello court was also assessing claims that had different geneses against two defendants, the union and employer,

which seldom had a similar interest or defense in opposition to the plaintiff's claims. Also, the hybrid claim in DelCostello presented a situation wherein the union could only be liable if the plaintiff's damages had been enhanced by its refusal to act. These circumstances, the DelCostello court found, are appropriate for interstitial lawmaking in the § 10(b) limitation.

However, none of the factors at issue in DelCostello figure into the selection of a limitations period for a Title I action. Prior to the flurry of reconsideration by the courts of appeal following DelCostello, a number of limitations periods had been applied to Title I actions, from one year for a tort action in Alabama, Sewell v. Grand Lodge of International Association of Machinists and Aerospace Workers, 445

F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972), to the ten-year statute of limitations in Louisiana, Dantagnan v. I.L.A. Local 1418, AFL-CIO, 496 F.2d 400 (5th Cir. 1974). Most courts had applied statute of limitations of from two to four years. See, e.g., Copitas v. Retail Clerks International Association, 618 F.2d 1370, 1373 (9th Cir. 1980); Howard v. Aluminum Workers International Union 400, 589 F.2d 771 (4th Cir. 1978); Berard v. General Motors Corporation, 493 F.Supp 1035 (D. Mass. 1980), aff'd without opinion, 657 F.2d 261 (1st Cir. 1980), cert. denied, 451 U.S. 987 (1981). These cases tended to recognize the similarity of Title I actions to civil rights actions brought under 42 U.S.C. § 1983. See, e.g., Copitas, 618 F.2d at 1373; Howard, 589 F.2d at 774.

The Court has specifically recognized that short administrative statutes of limitations for filing charges with a federal agency are unsuited for civil rights actions. Burnett v. Grattan, 468 U.S. 42 (1984). As noted in Burnett, the dominant characteristic of civil rights actions is that they belong in court. Assuring the full availability of a judicial forum necessitates attention to such practicalities of litigation as determining the extent of injury, either securing funds to obtain counsel or preparing to proceed pro se, conducting sufficient investigations to draft pleadings that meet the requirements of the federal rules (including Rule 11), as well as the responsibilities that immediately follow filing the

complaint. Burnett v. Grattan, 468 U.S. at 50-51.

These practicalities are "strikingly different" than those facing a complainant to an administrative agency. Burnett, 468 U.S. at 50-51. Once a union member files an unfair labor practices charge with the NLRB, the agency assigns an agent to investigate the case. The agency's investigation includes the interviewing of witnesses and the use of an informal conference with the parties. The charge may then be disposed of informally or the agency may issue a complaint. 29 U.S.C. § 160(1). Since many of the actions which must be undertaken prior to the filing of a Title I legal action are handled by an agency subsequent to the filing of an administrative unfair labor practice charge, the practicalities

of filing a Title I complaint require a longer limitations period.

Another factor, which may be considered either a practicality of litigation or a pertinent policy consideration, is that the decision to bring an action against union officials is not to be made lightly, for one will always be remembered as the person who challenged the established order. A plaintiff may be well advised to wait in hope that conditions will improve before taking an action that "may have much to do with one's future fate even if one is successful." Doty v. Sewall, 784 F.2d 1, 9 (1st Cir. 1986).

Additionally, there is a societal interest to be gained by allowing a union member time to decide if he is willing to battle the suppression of the rights of individual union members. As noted

by the Doty court, the relief gained by successfully pursuing an action that benefits union democracy benefits not only himself but all union members and the public at large. Doty, 784 F.2d at 9.

In sum, the practicalities of litigating Title I claims again point to the borrowing of the same limitations applied to other civil rights actions, the state limitations for personal injury.

The court's recent decision in Agency Holding Corporation v. Malley-Duff Associates, ___ U.S. ____, 97 L.Ed.2d 121 (1987), simply confirms that the appropriate limitations period for a Title I action should be borrowed from the state limitations for personal injury. In Agency Holding the Court noted that the decision regarding the selection of a limitations period is actually a two-

step process. Initially a court must determine if the claim is one which should always be characterized in the same fashion or if its characterization may vary depending on the varying factual circumstances and legal theories involved. Then a court must determine if the normal course of selecting the applicable state statute is proper. Only in rare instances will an exception like that in DelCostello be appropriate. Id. at 128.

All of the courts which have considered the limitations period for a Title I claim subsequent to DelCostello, whether they applied the § 10(b) limitation or the state personal injury limitation, have recognized that Title I claims should be characterized in the same way for determining the appropriate limitations period.

No. 87-1031

In The

Supreme Court of the United States

October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Does the six-month limitations period contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), applied by this Court to actions brought against unions for breach of the duty of fair representation in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), apply equally to actions brought against unions alleging violations of Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411-415?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF CASE

Petitioner G. P. Reed (hereinafter, "Reed" or "petitioner"), a member in good standing of the Respondent United Transportation Union (hereinafter, "UTU") and a Secretary-Treasurer of its Local 1715, filed this action on or about August 2, 1985, primarily seeking relief under Section 101 of the Labor-Management Reporting and Disclosure Act (hereinafter, "LMRDA") (29 U.S.C. 411) for

violation of his LMRDA "Bill of Rights" in the UTU's requirement, after audit, that he repay approximately $1,200.00 to the Local that he had in UTU's view impermissibly reimbursed himself. The complaint also contained pendent state law claims sounding in quantum meruit and allegations concerning breach of the fiduciary obligations by UTU officers with respect to their duties under Title V of LMRDA.

After UTU (and its officers specifically named in the complaint, also Respondents herein, to wit, its President, F. A. Hardin, one of its Vice Presidents, K. R. Moore, and one of its International Auditors, J. L. McKinney) moved for summary judgment on the ground, *inter alia*, that Reed had filed his action outside the applicable six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act (hereinafter, "NLRA") (29 U.S.C. 160(b)), the parties submitted affidavits in support of their respective positions as well as legal memoranda.

After hearing oral argument on January 31, 1986, the district court on April 30, 1986 (filed May 1, 1986) entered its order wherein it determined that the claims under LMRDA "Bill of Rights" and the pendent state law claims related thereto were not subject to the six-month statute of limitations contained in 29 U.S.C. 160(b). (Pet. App. at 1a-45a; Jt. App. at 42-68).[1] The Court further found that Reed had not sufficiently complied with Title V of LMRDA to raise any issue with respect to the fiduciary

[1] References to the Appendix to the Petition appear as "Pet. App. at —." References to the Joint Appendix appear at "Jt. App. at —."

obligation of UTU or its officers. *(Id.)* The district court in its order noted the importance of the limitations question and that it was a matter of first impression within the Circuit opening the possibility for certification to the Fourth Circuit under 28 U.S.C. 1292. *(Id.)* After petition to the Fourth Circuit pursuant to such statute, the petition of UTU and its officers was granted. (Pet. App. at 48a-49A). Reed did not seek interlocutory review of the holding of the district court with respect to dismissal of his claim under Title V of LMRDA. After briefing and argument the Fourth Circuit reversed, holding the six-month limitations period in 29 U.S.C. 160(b) applicable to Petitioner's claims. (Pet. App. at 48a-70a).

The facts as found by the district court related to this matter for present purposes are correct and are essentially uncontested. As the district court found, in August 1982, Fred A. Hardin, President of UTU, sent J. L. McKinney, one of UTU's International Auditors, to audit the books and records of Local 1715, where Reed served as Secretary-Treasurer. The audit was prompted by a letter to President Hardin from a member of Local 1715 regarding concerns about financial stability and the future of the Local. (Jt. App. at 13-15). After the audit, McKinney disallowed checks paid by the Local to Reed for "time lost" in the sum of $1,210.20. (Jt. App. at 16-18).

Reed appealed McKinney's findings to President Hardin by letter dated September 6, 1982, claiming that repayment of the sum found was demanded on the basis that he get prior approval for reimbursement for "time lost." (Jt. App. at 18-21). Reed claimed that no such prior approval requirement had existed or been enforced

before its application and enforcement against him. (Jt. App. at 19).

President Hardin denied Reed's appeal by letter dated October 1, 1982, explaining that when a local officer is salaried, his regular salary is meant to cover the responsibilities of his office, and further noting that the sum was disallowed because the claims had been for performance of ordinary duties and responsibilities and because in substantial part the time claimed was for work with a Field Supervisor, who sells UTU Insurance Association policies not related to work of the Local. (Jt. App. at 21-24). Reed thereafter sought to enforce what he perceived to be the "prior approval" policy against other officials of Local 1715, who had to take time off unexpectedly to handle disciplinary matters. Plaintiff's attempts were rejected by President Hardin. On June 28, 1983, Reed met with UTU Vice President K. R. Moore to determine, in his view, whether UTU planned to continue to enforce dual policies with respect to reimbursement of expense payments. Reed claims that Vice President Moore refused to discuss the matter with him. (Jt. App. at 25).

Reed's counsel wrote to President Hardin on July 18, 1983, seeking repayment of the $1,210.20, claiming that different standards were applied to Reed than to other union members, asserting that there was a conflict between Fred Warlick, Chairman of Local 1715, and Reed, and that a violation of 29 U.S.C. 411 existed. (Jt. App. at 24-26). President Hardin responded to Reed's counsel in a July 22, 1983, letter stating that the issue of the time disallowed to Reed as a result of the audit was closed. (Jt. App. at 26). Reed's counsel responded again by letter of August 2, 1983, in which he again requested reimbursement, and

also informed President Hardin that he was going to advise Reed "to commence litigation on or about September 15, 1983, unless the union has properly reviewed and reconciled this matter." (Jt. App. at 26-27).

Reed is a long time officer at the local level within the organization. The friction between the two officers (Reed and Warlick) does go to the bargaining relationship with the employer, as is made clear in the letter from member Clark prompting the audit. (Jt. App. at 13-15). Further, Reed claims Warlick has accused him during negotiations with the employer of being a "company man" and that Warlick has stated all company people are "bastards" (Jt. App. at 28). Warlick denies that allegation (Jt. App. at 38), but admits to disagreement with Reed over bargaining contract proposals.[2] *(Id.)*

Although petitioner claims in brief *(Brief for the Petitioner* at 6) that the audit closely followed a "heated disagreement" with Warlick, the letter from member Clark stands as the only matter of record at this point that caused the audit. Moreover, petitioner's claim that President Hardin is a political ally of Warlick is unsupported beyond its mere assertion in the current record.

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[2] Although the employer here is a public transit authority, since the authority acquired the system from a private carrier and the Department of Transportation makes operating and capital grants to the authority under the Urban Mass Transportation Act of 1964, Section 13(c) of that Act requires continued recognition of pre-existing collective bargaining rights, 49 U.S.C. 1609(c).

SUMMARY OF ARGUMENT

In *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151 (1983), this Court applied the six-month limitations period in Section 10(b) of the National Labor Relations Act ("NLRA") (29 U.S.C. 160(b)) to actions for breach of the duty of fair representation, rather than the most relevant state statute of limitations, as indicated by the holding in *United Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966). The rationale of the decision essentially was that uniformity was required with regard to a federal claim, which had a closely analogous federal limitations statute.

The same factors which motivated the Court in *DelCostello, supra,* are equally applicable here. A claim under Title I of the LMRDA cannot be divorced from the statutory background in which it arises. Civil rights claims emanating from 42 U.S.C. 1981 and like enactments not only have their roots in the federal constitution, but also relate to purely personal rights, making them different in kind from an LMRDA "Bill of Rights" claim, which is woven into the fabric of federal labor law. The cases applying the *DelCostello* six-month limitations period to LMRDA Title I claims to date recognize this distinction.

The right to form or belong to a labor union is not protected by the federal constitution. Nor was it fully protected by federal statutory law until the Wagner Act in 1935. In fact, the Sherman Act (15 U.S.C. 1-7) was held to be applicable against the activities of labor unions as combinations in restraint of trade. *Loewe v. Lawlor,* 208 U.S. 274 (1908). It was not until Section 6 the Clayton Act (15 U.S.C. 17) removed the labor of individuals as an article of commerce that the faintest outline of federal recognition of the legitimacy of collective bargaining appeared. Even in the more mature precincts of railway labor, no true recognition of rights to collectively bargain occurred until the first Railway Labor Act was passed in 1926.

The legislative history of the LMRDA itself indicates that the "Bill of Rights" granted to individual union members in Title I was concerned with the continuing development of a federal statutory labor policy and was necessitated in Congress' view principally because labor had outgrown its pure trade union roots to more closely resemble a bureaucracy rather than a fraternity. The primary focus of the Act was the effect this development had on the national labor policy. The Bill of Rights in LMRDA was at best a conferral of rights in an overall statutory scheme designed to protect existing federal labor law rights.

Nothing in *Finnegan v. Leu,* 456 U.S. 431 (1982) is to the contrary. While that case noted the parallel between Title I of the LMRDA and the Bill of Rights in the federal constitution, this Court has cautioned before that the LMRDA as a product of political compromise, cannot always be taken at face value. *Hall v. Cole,* 412 U.S. 1, 11, n.17 (1973) (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich.L. Rev. 819, 852 (1960)). The underlying purpose of the legislation was not to protect personal civil rights in the abstract, but to ensure that the free choice of representatives protected by Section 7 of the NLRA in 1935, insulated from harassment by the Labor Management Relations Act

in 1947, would be driven by democratic processes. Taken together, the three Acts represent a continuum of the national labor policy.

Nor has the applicability of *DelCostello* been limited to "hybrid" suits, such as *DelCostello* itself. The duties of a rail carrier under the status quo provisions of the Railway Labor Act (45 U.S.C. 151 *et seq.)* have been held to be subject to a *DelCostello* six-month limitations defense. *Robinson v. Pan American World Airways,* 777 F.2d 84 (2d Cir. 1985); *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.,* 768 F.2d 914 (7th Cir. 1985). Moreover, even though there is no such thing as an unfair labor practice charge under the Railway Labor Act, the circuit courts have uniformly held *DelCostello* to be applicable to hybrid claims against rail carriers and unions. *Welyczko v. U.S. Air,* 733 F.2d 239 (2d Cir.), *cert. denied,* 469 U.S. 1036 (1984); *Linder v. Berge,* 739 F.2d 686 (1st Cir. 1984); *Sisco v. Consolidated Rail Corp.,* 732 F.2d 1188 (3rd Cir. 1984); *Hunt v. Missouri Pacific R.R.,* 729 F.2d 578 (8th Cir. 1984). Moreover, *DelCostello* has been applied where only the union is sued for breach of the duty of fair representation. *Triplett v. Brotherhood of Ry. and Airline Clerks,* 801 F.2d 700 (4th Cir. 1986); *Ranieri v. United Transportation Union,* 743 F.2d 598 (7th Cir. 1984). This Court has not taken issue with these holdings to date. *See, West v. Conrail,* 481 U.S. —, 95 L.Ed. 2d 32, 36-37 n.2 (1987). Finally, this Court has itself recently used the principles of *DelCostello* to apply the analogous four-year civil enforcement statute of limitations in the Clayton Act to civil claims under RICO. *See, Agency Holding Co. v. Malley-Duff & Assocs.,* 483 U.S. —, 97 L.Ed. 2d 121, 127-28 (1987).

The federal policies at stake are no less important in Title I matters than they are in actions for breach of the duty of fair representation and hybrid actions. The NLRB has consistently maintained that any union coercion against a member, if violative of the policy of the labor laws, such as Title I of the LMRDA, is an unfair labor practice under Section 29 U.S.C. 158(b)(1)(A). *See, e.g., Machinists Local 707,* 276 ULRB 985 (1985). Moreover, it is not difficult to recast a duty of fair representation claim into an LMRDA Title I claim. *See, e.g., American Postal Workers Local Union Local 6885,* 665 F.2d 1096, 1105 n.19 (D.C. Cir. 1981). The family resemblance referred to in *DelCostello* is indeed present in Title I claims as well.

As to the practicalities of litigation, Title I claims are rarely latent. Once discovered, it does not take long to obtain the assistance of a lawyer, as the record in this case amply demonstrates. Moreover, any potential latency problem is cured by the accrual analysis. An action accrues only when the member knows or in the exercise of reasonable diligence should know of the facts comprising the alleged violation.. *Metz v. Tootsie Roll Industries,* 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 976 (1984). Finally, the lingering threat of assertion of Title I claims can have a debilitating effect within the union if allowed to fester, as noted by the Fourth Circuit below *(Reed v. United Transportation Union,* 828 F.2d 1066, 1070 (4th Cir. 1987)), making speedy resolution all the more desirable in the practicalities of litigation.

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ARGUMENT

I. The DelCostello Analysis and Its Property as Applied by the Majority of the Circuits to LMRDA Title I Claims

In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), this Court held that Section 10(b) of the NLRA (29 U.S.C. 160(b)) should be applied as a general statute of limitations to actions against a labor union by its members for breach of the duty of fair representation. In so holding, this Court rejected as inappropriate in the area of labor law dealing with the duty of fair representation, the general principle that in the absence of a specific federal statute of limitations, the applicable statute of limitations in the forum state be used. *See, United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). The reason for this departure from general law in this area was: (1) the clear analogy of Section 10(b) of the NLRA to a suit for the breach of the duty of fair representation; and (2) the federal policy at issue and the practicalities of litigation, i.e., that the national labor policy strongly favors a quick resolution of labor disputes of this type.

Since *DelCostello, supra*, seven circuits, including the Fourth Circuit below, have considered whether the six-month statute of limitations of Section 10(b) of the NLRA (29 U.S.C. 160(b)) should be applied to actions by members against unions for violation of their "Bill of Rights" under the LMRDA (29 U.S.C. 411). Five of those seven circuits have decided that the rationale of *DelCostello, supra*, is equally applicable to LMRDA "Bill of Rights" actions and have applied the six-month statute of limitations. *See, Reed v. United Transportation Union*, 828 F.2d 1066 (4th Cir. 1987); *Clift v. United Auto Workers*, 818 F.2d 623 (7th Cir. 1987), *petition for cert. pending*, No. 87-42; *Davis v. United Auto Workers*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1284 (1986); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *Steelworkers Local 1397 v. United Steel Workers of America*, 748 F.2d 180 (3rd Cir. 1984); *Vallone v. International Bhd. of Teamsters Local 705*, 755 F.2d 520, 521-22 (7th Cir. 1984).

Two circuits recently have refused to apply the six-month statute of limitations to an LMRDA "Bill of Rights" claim. *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986); *Rodonich v. House Wreckers Local 95*, 817 F.2d 967 (2d Cir. 1987). The First Circuit had earlier applied the six-month statute of limitations to a claim under 29 U.S.C. 414 (dealing with the obligation in Title I of the LMRDA of labor organizations to provide access to a copy of the collective bargaining agreement to their members). *See, Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984). The Second Circuit had earlier cited *Steelworkers Local 1397 v. United Steelworkers of America, supra*, with favor to support the proposition that it is undisputed that federal labor policy strongly favors prompt settlement of disputes, and noting the language that where the claimed unlawful activity (in that case, violation by an air carrier of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. 152 Fourth) is not latent, but rights are denied openly, a six-month period is an adequate time within which to bring an action. *Robinson v. Pan American World Airways*, 777 F.2d 84 (2d Cir. 1985).

The Seventh Circuit in *Vallone v. International Bhd. of Teamsters Local 705, supra*, adopted the reasoning of

DelCostella, supra, in applying the six-month statute of limitations from Section 10(b) of the NLRA (29 U.S.C. 160(b)) to an LMRDA Title I claim:

> [b]ecause of the strong federal policy favoring uniformity of labor laws and the 'rapid final resolution of labor disputes.' 103 S.Ct. 2292, and because in Section 10(b) 'Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system.' *Id.* at 2294 . . . . 755 F.2d at 520-22.

In *Adkins v. International Union of Electrical Workers, supra,* the Sixth Circuit also applied the six-month statute of limitations from Section 10(b) of the NLRA to an LMRDA "Bill of Rights" claim, holding:

> [T]he factors guiding the Supreme Court's choice of the six-month limitations period for unfair labor practices in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), however, were the close similarity of 'all breaches of a union's duty of fair representation' to unfair labor practices and the Congressional indication of the proper balance between the employee's interests in vindicating his rights and the national interest and finality in labor law and industrial peace. *DelCostello,* 461 U.S. at 170-71. These considerations compel application of Section 10(b) to all unfair representation claims . . . , regardless of the nature or presence of the Section 301 claim . . . 769 F.2d at 334-35.

In *Steelworkers Local 1397 v. United Steel Workers of America, supra,* the Third Circuit followed the *DelCostello, supra,* analysis and held that a LMRDA "Bill of Rights" claim was barred by Section 10(b) of the NLRA (29 U.S.C.

160(b)), finding that both are "addressed to the same basic concern; the protection of individual workers from arbitrary actions by unions . . . ." 748 F.2d at 183. While recognizing that a union member needs sufficient time to vindicate his rights under LMRDA, the Third Circuit held that "rapid resolution of internal union disputes is necessary to maintain the federal goal of stable bargaining relationships, for dissension within a union naturally affects that union's activities and effectiveness in the collective bargaining arena." *Id.* at 184. The Court essentially found no difference between the filing of a Section 301 claim for breach of the duty of fair representation and an LMRDA claim insofar as limitations periods are concerned. *Id.*

The Eleventh Circuit in *Davis v. United Auto Workers, supra,* adopted the result reached by its sister circuits to the date of its decision, feeling "constrained by the rationale of *DelCostello* and the holdings of our sister circuits to reach the same conclusion in the present case." 765 F.2d at 1514.

II. The Impropriety of the "Civil Rights" Analogue Applied by the First and Second Circuits

Only the First and Second Circuits in their recent decisions in *Doty v. Sewall, supra,* and *Rodonich v. House Wreckers Local 95, supra,* have applied *Hoosier-Cardinal, supra,* and rejected the *DelCostello, supra,* analysis, although both circuits, as noted above, had earlier applied *DelCostello* to other areas of law. Those decisions go astray principally in their belief that the "Bill of Rights" portions of LMRDA are akin to civil rights in the federal constitution and in the Civil Rights Acts (42 U.S.C. 1981,

1983), rather than rights conferred as part of an overall regulatory scheme encompassing the national labor policy. *See*, 784 F.2d at 8; 817 F.2d at 977. What this belief fails to recognize is that the "purpose and operation of such rights cannot be divorced from general principles governing our federal labor policy." *Steelworkers Local 1397 v. United Steel Workers of America, supra,* 748 F.2d at 183; *see also, McConnell v. International Bhd. of Teamsters*, 606 F.Supp. 460 (S.D. N.Y. 1985).

The Congress itself in setting the national labor policy has struck a balance in Section 10(b) of the NLRA (29 U.S.C. 160(b)) between "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement." *DelCostello, supra*, 462 U.S. at 171. The Congressional balancing of interests in Section 10(b) of the NLRA (29 U.S.C. 160(b)) are the same interests at issue in the LMRDA. "Promoting stable bargaining relationships between unions and employers necessitates prompt resolution of not only fair representation claims arising from employee grievances, but also the type of policy disputes and disciplinary action" upon which a plaintiff may base an LMRDA "Bill of Rights" claim. *See, Steelworkers Local 1397 v. United Steel Workers of America, supra,* 748 F.2d at 182; *Vallone v. International Bhd. of Teamsters Local 705, supra,* 755 F.2d at 520.

The analyses in *Doty v. Sewall, supra, and Rodonich v. House Wreckers Local 95, supra,* are deficient because they divorce the LMRDA "Bill of Rights" from the statutory background in which they arise. As very strong policy matter, clearly expressed by this Court in *DelCostello,*

supra, the national labor policy demands a quick resolution and finality to labor disputes whether they occur internally or externally. The six-month statute of limitations carries out the national labor policy enunciated by the Congress. The three-year North Carolina statute petitioner would have the Court apply here *(Howard v. Aluminum Workers International Union,* 589 F.2d 771 (4th Cir. (1978)) does not.[3]

The fact that the First Circuit in *Doty v. Sewall, supra,* noted the existence of a "hybrid" breach of duty of fair representation/breach of contract claim with the LMRDA claim present in two decisions relied upon by respondents which did apply the six-month period of limitations, *Adkins v. International Union of Electrical Workers, supra,* and *Vallone v. International Bhd. of Teamsters Local 705, supra,* is not decisive. The Seventh Circuit in *Vallone, supra,* gives no indication that the presence of the hybrid action was determinative of the application of the six-month *DelCostello* rule to the LMRDA claim. In *Adkins, supra,* the Sixth Circuit found that the close similarity of all breaches of a union's duty of fair representation required application of the six-month limitations period to the LMRDA claim regardless of the nature or presence of a hybrid claim. 769 F.2d at 335.

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[3] The reliance the non-Government *amici* place on the burden allocation provisions contained in Title III of the LMRDA, dealing with trusteeships, is misplaced. That policy is clearly designed to be a burden-shifting device in the specific situation of a union trusteeship, which is not at issue here. Indeed, the *amici* prove too much by relying upon Title III of LMRDA concerning trusteeships, because in that specific area the Congressional choice with respect to the timing of an action is clearly evident on the face of the statute. That is not true here.

Finally, the Third Circuit in *Steelworkers Local 1397 v. United Steelworkers of America, supra*, saw the family resemblance between an LMRDA claim and a hybrid claim, considering them to be indistinguishable for purposes of applying the six-month limitations period from *DelCostello*, further making clear its view that the family resemblance was sufficient to apply the same limitations period whether the conflict between the member(s) and the union was internal (LMRDA) or external (a hybrid claim). 748 F.2d at 183.

A. The National Labor Policy and the LMRDA "Bill of Rights" in Historical Perspective

Labor unions in the United States did not have an auspicious beginning. Early in the 19th century courts using a criminal conspiracy theory held that any concerted activity, even to raise wages, was an indictable offense. 1 *The Developing Labor Law* (Morris, ed.) (Bur. of Nat'l Affairs 1983) at 4. Although in *Commonwealth v. Hunt*, 4 Met. 111 (1842), Chief Justice Shaw of Massachusetts narrowed the criminal conspiracy doctrine as requiring either an illegal purpose or resort to illegal means (*Id.*), courts remained ill-equipped to deal with the growing labor movement (*Id.* at 5-8).

This Court itself applied the Sherman Act (15 U.S.C. 1-7) to labor unions in *Loewe v. Lawlor*, 208 U.S. 274 (1908) (the *Danbury Hatters'* case), indicating that it would be enough to establish a violation if the concerted activity obstructed the flow of the employer's product in interstate commerce. (*Id.* at 292-93). Although Section 6 of the Clayton Act passed in 1914 removed the labor of an

individual as an article of commerce (15 U.S.C. 17), this Court narrowly construed that exception in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and held it to exempt only concerted activity already regarded as lawful at the common law, and even then, only to settle a primary dispute. *See also, United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922). The results of this Court's construction of the Sherman and Clayton Acts left labor unions in a virtually identical position to what they had encountered under the common law.

After several fits and starts in the railway labor arena,[4] the Congress passed the first Railway Labor Act in 1926, which this Court upheld in *Texas & New Orleans R.R. v. Brotherhood of Railway and S.S. Clerks*, 281 U.S. 548 (1930). The Norris-LaGuardia Act (29 U.S.C. 101-15) followed in 1932, taking federal courts out of the business of issuing injunctions in labor disputes.

With the 1934 amendments to the Railway Labor Act (45 U.S.C. 151, *et seq.*) setting the stage, the National Labor Relations Act enacted in 1935 (29 U.S.C. 151, *et seq.*) created a right to organize, and made it enforceable, unlike the earlier provisions of the National Industrial Recovery Act (NIRA) enacted in 1933 (48 Stat. 198). The rights to organize, bargain collectively and engage in concerted activity contained in Section 7 of the Act (29 U.S.C. 157) "were considered essential to establish a balance of bar-

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[4] The Erdman Act, enacted in 1898 (30 Stat. 424 (1898), was the first statutory recognition of labor unions. It applied only to employees engaged in the operation of interstate trains. Its mediation provisions were in effect until the Government took over the railroads in World War I. However, this Court held its anti-union discrimination provision invalid in *Adair v. United States*, 208 U.S. 161 (1908).

gaining power between employer and employee and thereby to avoid the pitfalls and inadequacies which had characterized earlier labor legislation." I *The Developing Labor Law, supra*, at 28. The implementation of those rights was left particularly to the provisions of Section 8 (29 U.S.C. 158), which defined employer unfair labor practices. This Court upheld the constitutionality of the NLRA in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), adopting a more liberal approach to use of the commerce power that it had previously.

Criticism of the NLRA commenced immediately after its passage, principally along the lines that it was "one-sided legislation," in its provision for majority rule which, in the view of the critics, deprived minorities and individual employees of their negotiation rights. I *The Developing Labor Law, supra*, at 30. The passage of the Labor Management Relations Act in 1947, *inter alia*, created Section 8(b) in its entirety, adding six union unfair labor practices, principal among which, for purposes of the present discussion, was Section 8(b)(1) (29 U.S.C. 158(b)(1)), which forbid union restraint or coercion of employees in the exercise of the rights guaranteed in Section 7. It is clear from the language of the statute itself that the addition of rights against harassment by the freely chosen representative itself related to the overall exercise of the cornerstone of the federal labor policy embodied in Section 7 of the Act (29 U.S.C. 157).

That did not change with the passage of the LMRDA in 1959. The purpose of the Senate version (S. 1555) was "to correct the abuses which have crept into labor and management and which have been subject of investigation by

the Committee on Improper Activities in the Labor and Management Field for the past several years." S. Rep. No. 187, 86th Cong., First Sess. (1959), in 2 U.S. CODE CONG. AND ADMIN. NEWS at 2318, 86th Cong., 1st Sess. (1959). It was recognized that the trade union movement was facing difficult internal problems, brought on by having grown well beyond its modest beginnings as relatively small, closely knit associations of working people where personal, fraternal relationships were characteristic. (*Id.* at 2322). Unions had become like other American institutions, large and impersonal, acquiring bureaucratic tendencies and characteristics, with their memberships like other Americans having sometimes become apathetic in the exercise of their personal responsibility for the conduct of union affairs. (*Id.*) Although finding that American labor in general desired to conduct its internal affairs democratically, it would not be possible to guarantee internal union democracy without use of the coercive powers of the Government. (*Id.*) Just as much a focus of the legislation was the recognition that employees' rights to form and join unions without interference and to enjoy freely the right to collectively bargain had been impinged by certain employer conduct, such as the use of middle men to organize "no-union" committees and to engage in other activities to prevent union organization among employees. (*Id.* at 2322-23). It was recognized that in the imposition of governmental standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents. (*Id.* at 2323).

The House in the consideration of its bill covering the same topic (H.R. 8342) made many of the same findings with regard to the need for legislation ensuring democratic

practices in the exercise of Section 7 rights. H. Rep. No. 741, 86th Cong., 1st Sess. (1959), in 2 U.S. CODE CONG. AND ADMIN. NEWS 2428-29, 86th Cong., 1st Sess. (1959). The Conference Committee had little difficulty in reconciling the two versions of Title I of each bill, which became Title I of LMRDA. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959), Statement of the Managers on the Part of House, in 2 U.S. CODE CONG. AND ADMIN. NEWS 2503-04, 86th Cong., 1st Sess. (1959).

It is apparent that all that the Congress was concerned with in the passage of Title I of LMRDA was to ensure that the exercise of Section 7 rights to freely choose representatives would not be inhibited by undemocratic internal union conduct. To characterize these rights as either purely economic or purely civil rights misses the point. Title I of LMRDA simply cannot be considered in alien juxtaposition to the historical development of the national labor policy, for it is part of that development and policy. LMRDA rights serve the same purpose as the NLRA and LMRA rights. The family resemblance these rights bear to the rights protected by Section 10(b) of the NLRA (29 U.S.C. 160(b)) cannot be denied. The rights at issue here arise out of a clearly stated and fully developed national labor policy. They do not arise out of the federal constitution or the Civil Rights Acts (42 U.S.C. 1981, 42 U.S.C. 1983).

While this Court in *Finnegan v. Leu,* 456 U.S. 431 (1982) has noted the parallel between Title I LMRDA rights and the Bill of of Rights in the federal constitution, it has also cautioned in the past that the LMRDA, as a product of political compromise, cannot always be taken at

face value. *Hall v. Cole,* 412 U.S. 1, 11 n.17 (1973) (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L.Rev. 819, 852 (1960)). In *Finnegan v. Leu, supra,* itself this Court recognized that the LMRDA "Bill of Rights" was "necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of the membership," 456 U.S. at 435-36. Thus, the LMRDA "Bill of Rights" are inextricably intertwined with the national labor policy.

Respondents submit also that this Court's cautionary words in *Hall v. Cole, supra,* are equally applicable here because the underlying purpose of LMRDA was not to protect rights in the abstract, but to ensure that the freedom of choice granted by Section 7 of the NLRA in 1935 and insulated from harassment by the Labor Management Relations Act of 1947, would be driven by democratic processes. The granting of LMRDA Title I rights implements the Section 7 rights that are the cornerstone of the national labor policy. The opinions of the First Circuit in *Doty v. Sewall, supra,* and the Second Circuit in *Rodonich v. House Wreckers Local 95, supra,* are deficient in failing to recognize that. Their underpinning is that Title I LMRDA rights bear a closer resemblance to civil rights contained in the federal constitution or the Civil Rights Acts than they do to rights contained in the continuum of the national labor policy. It is from that erroneous premise that both decisions reached the erroneous conclusion that the *DelCostello* analysis is not appropriate in LMRDA Title I cases.

B. Impact of Internal Union Matters on Bargaining

The case at bar plain and simple involves an apparently protracted dispute between one local union officer (Chairman Fred Warlick) and another local union officer (Reed). Just as the Third Circuit in *Steelworkers Local 1397 v. United Steelworkers of America, supra,* found that friction between a local union and the international union threatens stable bargaining relationships between the international and the employer, thus triggering the application of the six-month limitations period from *DelCostello* (748 F.2d at 184), so too the friction between these two local officers carries with it the same threat of instability, as the Fourth Circuit noted below. 828 F.2d at 1070. In fact, the non-Government *amici* are forced to admit that the facts of this case, and particularly the dispute about petitioner's status as a "company man," indicates some impact on economic relations between union and employer and on labor peace. (*Brief for Ass'n for Union Democracy and Public Citizen* at 16-17). The facts of this case frankly do no more than demonstrate the obvious in this regard.

III. Application of DelCostello Principles to Other Areas of Federal Law

The six-month limitations period from *DelCostello, supra,* has been extended to other areas of federal law. Indeed, although petitioner relies upon *Monarch Long Beach Corp. v. International Bhd. of Teamsters Local 812,* 762 F.2d 228 (2d Cir. 1985) for the proposition that the Second Circuit refused, prior to *Rodonich v. House Wreckers Local 95, supra,* to extend *DelCostello* beyond its hybrid action limits, it did apply the six-month limitations period to an action brought under the Railway Labor Act alleging

that employees were discharged for pro-union activities in violation of Section 2 Fourth of that Act (45 U.S.C. 152 Fourth). *See, Robinson v. Pan American World Airways, supra.* In *Monarch, supra,* the Second Circuit refused to extend the six-month period to secondary boycott actions brought by businesses against unrelated unions. It was not a collective bargaining dispute. Nor did it arise in a labor-management relationship context. Its relationship to the national labor policy overall was tangential.

But the Second Circuit in *Robinson, v. Pan American World Airways, supra,* cited *Steelworkers Local 1397 v. United Steel Workers of America, supra,* with favor, to support the proposition that it is undisputed that federal labor policy strongly favors prompt resolution of disputes, and noting the language in *Steelworkers Local 1397* that where the claimed unlawful activity is not latent, but rights are denied openly, a six-month period is an adequate time in which to decide whether to bring an action. 777 F.2d at 87. The same is true in the case at bar. A veteran union official (Reed), with more than competent counsel assisting him, made what appears to have been a conscious judgment not to pursue a Bill of Rights action existing in August of 1983 until August of 1985.

The Seventh Circuit also has applied the six-month limitations period to a claim arising under Section 2 First of the Railway Labor Act (45 U.S.C. 152 First) (requiring carriers to make and maintain agreements) in *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.,* 768 F.2d 914, 919 (7th Cir. 1985).

Moreover, even though there is no such thing as an unfair labor practice charge under the Railway Labor Act, the circuit courts have uniformly held *DelCostello* to be

applicable to hybrid claims against rail carriers and unions. *Linder v. Berge,* 739 F.2d 686 (1st Cir. 1984); *Sisco v. Consolidated Rail Corp.,* 732 F.2d 1188 (3rd Cir. 1984); *Hunt v. Missouri Pacific R.R.,* 729 F.2d 578 (8th Cir. 1984); *Welyczko v. U.S. Air,* 733 F.2d 239 (2d Cir.), *cert. denied,* 469 U.S. 1036 (1984). Additionally, *DelCostello* has been applied where only the union is sued for breach of the duty of fair representation. *Triplett v. Brotherhood of Ry. and Airline Clerks,* 801 F.2d 700 (4th Cir. 1986); *Ranieri v. United Transportation Union,* 743 F.2d 598 (7th Cir. 1984); *Erkins v. United Steelworkers of America,* 723 F.2d 837, 839 (11th Cir.), *cert. denied,* — U.S. —, 82 L.Ed. 2d 825 (1984). This Court has not taken issue with the holdings in the Railway Labor Act cases to date. *See, West v. Conrail,* 481 U.S. —, 95 L.Ed. 32, 36-37 n.2 (1987).

Finally, this Court itself recently used the principles of *DelCostello* to apply the analogous four-year statute of limitations in the Clayton Act to civil claims under RICO. *See, Agency Holding Corp. v. Malley-Duff & Assocs.,* 483 U.S. —, 97 L.Ed. 2d 121, 127-28 (1987).

IV. Application of DelCostello Principles to LMRDA Title I Claims

A. The Family Resemblance of Title I Claims to Unfair Labor Practices

The consistent policy of the NLRB that any union coercion, if it impairs a policy Congress has imbedded in the labor laws, is an unfair labor practice under 8(b)(1)(A) of the Act (29 U.S.C. 158(b)(1)(A)), approved by this Court in *Scofield v. NLRB,* 394 U.S. 423, 430 (1969), is demonstrative of the family resemblance that LMRDA

Title I claims bear to Section 10(b) of the NLRA (29 U.S.C. 160(b)) because LMRDA Title I rights are imbedded in the labor laws.

In *Buffalo Newspaper Guild,* 220 NLRB 79, 86-87 (1975) the Board found an unfair labor practice charge concerning the discipline of a member for complaining about LMRDA matters. In *Operating Engineers Local 400,* 225 NLRB 596 (1976), the union was held to have violated Section 8(b)(1)(A) in a classic LMRDA situation, discipline for intra-union political activities. Although the non-Government *amici* cite *East Texas Motor Freight,* 262 NLRB 968 (1982) for the proposition that this line of cases has been rejected by the Board, the language referred to is gratuitous, and has not been cited as supportive of the proposition since. Indeed, *Machinists Local 707,* 276 NLRB 985 (1985) reaffirmed this line of cases in confirming the validity of a Section 8(b)(1) charge for discipline in the form of filing of charges for making comments critical of union officials.

The circuits are split with regard to this Board doctrine. *Compare, Helton v. NLRB,* 656 F.2d 883, 896 n.67 (D.C. Cir. 1981) (approval of NLRB position that union conduct infringing upon LMRDA rights constitutes an unfair labor practice under Section 8(b)(1)(A)), *with, NLRB v. Local 139, Operating Engineers,* 796 F.2d 985 (7th Cir. 1986) (rejects LMRDA violation as basis for Section 8(b)(1) charge unless effect on employment can be shown). Nonetheless, it is apparent that at a minimum there is a family resemblance between a violation of LMRDA rights and unfair labor practices, thus subjecting such claims to the *DelCostello* six-month limitation.

Additionally, the decisional law clearly indicates that there is an interchangeability between LMRDA Title I

claims and claims of breach of the duty of fair representation. *See, Trail v. International Bhd. of Teamsters,* 542 F.2d 961, 966, 968 (6th Cir. 1976) (no distinction noted between LMRDA and duty of fair representation claims); *American Postal Workers Union Local 6885 v. American Postal Workers Union,* 665 F.2d 1096, 1105 n.19 (D.C. Cir. 1981) (claims for violation of LMRDA Title I rights and breach of the duty of fair representation are interchangeable and duplicative); *see also, Aguirre v. Automotive Teamsters,* 633 F.2d 168 (9th Cir. 1980); *Alvey v. General Electric Co.,* 622 F.2d 1279 (7th Cir. 1980).

B. The Federal Policies at Stake

The decisional law cited above supporting the proposition of the family resemblance of an LMRDA Title I claim to an unfair labor practice charge and/or a claim for breach of the duty of fair representation is also supportive of the proposition that the federal policies at stake are also the same. As argued above, LMRDA Title I rights are part of the fabric of the national labor policy. There is no realistic way of treating them separately. The federal policy at stake in all instances is the national labor policy.

C. The Practicalities of Litigation

The practicalities of litigating Title I claims is such that they are rarely latent. *Steelworkers Local 1397 v. United Steelworkers of America, supra,* 748 F.2d at 184. Once discovered, it did not take long for petitioner in the case at bar to obtain the assistance of counsel. Moreover, any potential latency problem is cured in the accrual analysis, since an action for violation of LMRDA Title I rights would accrue at the same time that an action for the breach of the duty of fair representation would accrue, that is,

when the member knows or in the exercise of reasonable diligence should know of the facts constituting the alleged violation. *Dozier v. Trans World Airlines,* 760 F.2d 849 (7th Cir. 1985); *Metz v. Tootsie Roll Industries,* 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 976 (1984); *see also, Shapiro v. Cook United,* 762 F.2d 49, 50 (6th Cir. 1985) (*per curiam*); *Howard v. Lockhead-Georgia Co.,* 742 F.2d 612, 614 (11th Cir. 1984).

Additionally, the practicalities of litigation arguments made by petitioner (*Brief for the Petitioner* at 49-50) are equally applicable to breach of the duty of fair representation cases. The practicalities of litigating a civil rights case discussed in *Burnett v. Grattan,* 468 U.S. 42 (1984) are simply inapposite here because the same policy questions are not present. This case deals with the national labor policy. As argued above, the civil rights analogy is simply inappropriate.

———o———

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 87-1031

In the Supreme Court of the United States

OCTOBER TERM, 1987

G.P. REED, PETITIONER

v.

UNITED TRANSPORATION UNION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a claim by a union member under Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411-415, alleging that the union violated his right to free speech in an internal union dispute, is governed by the state statute of limitations applicable to personal injury actions, or by the six-month statute of limitations applicable to unfair labor practice charges under the National Labor Relations Act, 29 U.S.C. 160(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes:

Statutes – Continued: Page

Miscellaneous:

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AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents a question concerning the statute of limitations applicable in actions by union members under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411-415. With one exception not relevant here (see 29 U.S.C. 414), Title I is enforced exclusively by private right of action. See 29 U.S.C. 412. Title I, however, shares the same aim as other titles of the LMRDA—specifically, "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections" (*Finnegan* v. *Leu*, 456 U.S. 431, 441 (1982))—and the Secretary of Labor has significant enforcement responsibilities with respect to these other titles. See, *e.g.*, Title II, 29 U.S.C. 431-441 (reporting); Title III, 29 U.S.C. 461-466 (trusteeships); Title IV, 29 U.S.C. 481-483 (union elections). Accordingly, the

Secretary of Labor has an interest in seeing that the proper statute of limitations is applied in LMRDA-Title I cases. The United States previously expressed the Secretary's views on this question in its brief amicus curiae in *Clift* v. *United Automobile Workers*, No. 87-42, submitted in response to the Court's invitation.

STATEMENT

1. Petitioner, G.P. Reed, is a member of respondent-union, United Transportation Union (UTU), and is Secretary-Treasurer of its Local 1715, in Charlotte, North Carolina (Pet. App. 2a, 50a).[1] In August 1982, UTU audited the books and records of Local 1715 and disallowed $1,210 in reimbursement checks paid by Local 1715 to petitioner on the ground that petitioner had failed to obtain prior approval for the reimbursements (*id.* at 50a-51a). Petitioner refunded the disallowed checks to Local 1715, but protested to respondent Fred H. Hardin, the UTU president, that the prior approval requirement was being selectively applied to him in retaliation for his failure to support the views of Local 1715's president (*id.* at 2a-3a, 51a-52a). Respondent Hardin denied petitioner's protest in October 1982, stating that a local officer's regular salary is meant to cover the responsibilities of his office, and that the reimbursements disallowed had been claimed for the performance of ordinary duties and responsibilities of petitioner's office (*id.* at 3a-4a).[2]

[1] As Secretary-Treasurer of a local labor organization, petitioner is an elected official. See J.A. 28; 29 U.S.C. 402(n), 481(b). Next Term, the Court will address the extent to which an elected union official can state a claim under Title I of the LMRDA. See *Sheet Metal Workers* v. *Lynn*, cert. granted, No. 86-1940 (Mar. 21, 1988). That issue is not, however, presented here.

[2] The record indicates that petitioner, a part-time union official, claimed reimbursement for "time-lost" from his regular job to perform union duties. J.A. 17-21.

After petitioner made several additional but unsuccessful attempts to change Local 1715's allegedly discriminatory reimbursement policy, his attorney wrote to respondent Hardin, in July 1983, complaining that respondents' actions violated Section 101 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 411 (Pet. App. 4a-5a).[3] Respondent Hardin answered

[3] Section 101 of Title I of the LMRDA (29 U.S.C. 411) provides, in pertinent part:

> (a)(1) *Equal rights*
>
> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) *Freedom of speech and assembly*
>
> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> * * * * *
>
> (5) *Safeguards against improper disciplinary action*
>
> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer

that the matter had been closed when petitioner refunded the disallowed reimbursements to Local 1715 (*id.* at 5a-6a). Petitioner's attorney then sent respondent Hardin another letter, stating that he had advised petitioner of respondent Hardin's answer, and informing respondent Hardin that he had advised petitioner " 'to commence litigation on or about September 15, 1983, unless the Union ha[d] properly reviewed and reconciled this matter' " (*id.* at 6a (citation omitted)).

Petitioner did not, however, commence this action until August 2, 1985, exactly two years after his attorney's last letter to respondent Hardin (Pet. App. 6a). In his complaint, petitioner alleged that respondent union and various union officials had violated his rights to freedom of speech and assembly, as well as his right to be safeguarded from improper disciplinary action, protected by Section 101 of Title I of the LMRDA (Pet. App. 6a-7a). Specificially, he claimed that the "prior approval" policy for reimbursements had been selectively applied to him as a means of punishing him for speaking out against Local 1715's president (*id.* at 7a-8a). Respondents denied the claim, and moved for summary judgment on the ground, *inter alia*, that petitioner had failed timely to commence his action within the six-month statute of limitations period set forth in Section 10(b) of the National Labor Relations Act (NLRA) (29 U.S.C. 160(b)), which respondents claimed governs actions under Title I of the LMRDA (Pet. App. 53a). Petitioner opposed the motion, arguing that he had timely commenced his action within the three-year limitations period applicable to personal in-

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thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; [and] (C) afforded a full and fair hearing.

* * * * *

jury actions in North Carolina, which he claimed governs his LMRDA-Title I claim (Pet. App. 39a-40a).

2. The district court denied respondents' motion for summary judgment, agreeing with petitioner that the three-year state statute of limitations applicable to personal injury claims governs actions under Section 101 of Title I of the LMRDA (Pet. App. 1a-45a). It noted that, "[b]ecause Congress has not explicitly provided a limitations period for such claims, the [c]ourt must 'borrow' the most appropriate statute of limitations from some other source" (*id.* at 10a). And it further noted that, in *Howard* v. *Aluminum Workers Int'l Union*, 589 F.2d 771 (1978), the Fourth Circuit had found that a claim under Section 101 of the LMRDA is similar to a personal injury claim under state law and, accordingly, that the state limitations period applicable to such personal injury claims should govern claims under Section 101 of the LMRDA (Pet. App. 10a-11a).

The court rejected respondents' argument that, under this Court's decision in *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983), the six-month statute of limitations applicable to unfair labor practice charges under the NLRA should apply to LMRDA-Title I claims (Pet. App. 11a-41a). It reasoned that, in contrast to the "hybrid" breach of contract/duty of fair representation claim that was at issue in *DelCostello*, "a union member's LMRDA Title I claim does not arise out of a labor-management relationship, but rather out of the union member's relationship with his union"; "[i]t impacts only tangentially, if at all, on the union's bargaining relationship with the employer"; and an LMRDA-Title I suit does not involve " 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it' " (*id.* at 37a-38a (citations

omitted)). Rather, the court concluded, "an LMRDA Title I claim more closely resembles a civil rights claim that an unfair labor practice charge" (*id.* at 38a).

On this basis, the court determined to apply North Carolina's three-year limitations period for personal injury actions to petitioner's claim and, under that statute, held petitioner's claim to be timely filed (Pet. App. 39a-40a). Because, however, the circuits were divided on this controlling question of law,[4] the district court certified the question for immediate review by the court of appeals (*id.* at 40a-41a).

3. The Fourth Circuit reversed (Pet. App. 48a-70a). Acknowledging the conflict among the circuits on the applicability of this Court's reasoning in *DelCostello* to claims raised under Title I of the LMRDA, the court reviewed the leading cases and concluded (Pet. App.

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[4] Since *DelCostello*, two courts of appeals have applied state limitations periods for personal injury actions to Title I claims. See *Doty* v. *Sewall*, 784 F.2d 1 (1st Cir. 1986) (denial of union membership to dissident); and *Rodonich* v. *House Wreckers Union Local 95*, 817 F.2d 967 (2d Cir. 1987) (union discipline against members of rival political faction). The First Circuit has, however, also applied Section 10(b) of the NLRA to a "hybrid" Railway Labor Act/LMRDA claim based on an employment-related grievance. See *Linder* v. *Berge*, 739 F.2d 686 (1984). Other circuits have applied Section 10(b) of the NLRA to various Title I claims. See *Local Union 1397* v. *United Steelworkers*, 748 F.2d 180 (3d Cir. 1984) (discipline imposed by international union on local union leaders); *Davis* v. *UAW*, 765 F.2d 1510 (11th Cir. 1985), cert. denied, 475 U.S. 1057 (1986) (expulsion of dissident union member); *Clift* v. *UAW*, 818 F.2d 623 (7th Cir. 1987), petition for cert. pending, No. 87-42 (LMRA/LMRDA challenge to modification of collective bargaining agreement); *Adkins* v. *International Union of Electrical Workers*, 769 F.2d 330 (6th Cir. 1985) (LMRA/LMRDA challenge to negotiation and implemention of collective bargaining agreements).

49a-50a, 67a) that the "pro-*DelCostello*" view of the Third Circuit, as set forth in *Local Union 1397* v. *United Steelworkers*, 748 F.2d 180 (1984), was more persuasive than the "anti-*DelCostello*" view of the First Circuit, as set forth in *Doty* v. *Sewall*, 784 F.2d 1 (1986). The court of appeals agreed with the Third Circuit's analysis in *Local 1397* that LMRDA "claims, though they be akin to civil rights claims, cannot be divorced from the federal labor policy favoring stable labor-management relations" (Pet. App. 67a). The court noted that, "[i]nternal union disputes, if allowed to fester, may erode the confidence of union members in their leaders and possibly cause a disaffection with the union, thus weakening the union and its ability to bargain for its members" (*id.* at 67a-68a); and it added that "[s]uch prolonged disputes may also distract union officials from their sole purpose—representation of union members in their relations with their employer" (*id.* at 68a). The court therefore rejected the First Circuit's reasoning in *Doty* that a union member's LMRDA-Title I claim may implicate only internal union matters and thus poses no threat to the stability of the labor-management relationship (*id.* at 64a, 67a-69a). For this reason, it held the six-month limitations period of the NLRA applicable to LMRDA-Title I claims (*id.* at 69a).

SUMMARY OF ARGUMENT

The court of appeals erred in applying the NLRA's six-month statute of limitations to a claim under Title I of the LMRDA. The better approach is to analogize LMRDA-Title I claims to civil rights claims and to borrow applicable state statutes of limitations for personal injury actions. On this view, we submit that the decision below should be reversed.

1. When a federal statute prescribes no limitations period, a suitable period must be borrowed from some other source. In identifying which statute of limitations should be borrowed, the Court has said that a determination should be made, first, whether the statute of limitations selected should be uniform and, second, whether the closest analogy is in state or federal law. See *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, No. 86-497 (June 22, 1987), slip op. 4, 6. With respect to the first question, a uniform characterization is appropriate; Title I of the LMRDA creates a "bill of rights" for union members, and the variety of underlying claims is susceptible to a multiplicity of characterizations. Thus, using more than one characterization would lead to uncertainty and wholly unproductive litigation. With respect to the second question, the best analogy for claims under Title I of the LMRDA lies in state law. Title I claims are akin to civil rights claims under the federal constitution and, in the context of other statutes securing basic civil rights against violation by state or private action, this Court has held that the state statutes of limitations for personal injury actions should govern. Thus, the district court's resort to the State of North Carolina's three-year limitations period for personal injury claims was correct.

2. The court of appeals resorted to the six-month statute of limitations applied by this Court in *DelCostello* to "hybrid" breach of contract/duty of fair representation claims under Section 301 of the Labor-Management Relations Act (LMRA) (29 U.S.C. 185). But the *DelCostello* analogy is inapt, because LMRDA claims differ in significant respects both from the hybrid breach of contract/duty of fair representation claims at issue in *DelCostello* and from the unfair labor practice claims to which the six-month limitations period of Section 10(b) of the NLRA was designed to apply.

Claims under Title I of the LMRDA, unlike hybrid breach of contract/duty of fair representation claims, will rarely, if ever, amount to unfair labor practices under the NLRA. Title I claims allege violations of "union democracy," and thus are concerned with the internal operation of the union. Claims under the NLRA, by contrast, generally relate to matters involving an employee's relationship with his or her employer and ordinarily do not relate to an employee's relationship with the union structure. And even when an internal union matter properly forms the basis for an unfair labor practice charge, its elements are distinct from the elements of an LMRDA claim. Thus, while the unfair labor practice provisions of the NLRA provided a reasonable analogy to the claims at issue in *DelCostello*, the same cannot be said here.

Furthermore, LMRDA claims will rarely, if ever, implicate the same balance of interests presented by a "hybrid" breach of contract/duty of fair representation action, or an unfair labor practice charge raising this issue. Generally, as in this case, an LMRDA claimant does not challenge any part of the collective bargaining or grievance/arbitration process; the LMRDA claimant generally challenges only internal union matters. Such challenges cannot directly upset the balance of power in labor-management relations struck by the NLRA. Of course, even in cases where a closer factual nexus exists between the LMRDA claim and the collective bargaining or grievance adjustment process, the relief available under the LMRDA generally cannot extend to setting aside the results of the collective bargaining or grievance adjustment process. Title I authorizes no relief against employers; LMRDA claimants are basically limited to relief against the union. In any event, even if the relief available could be said to implicate the collective bargaining or grievance adjustment processes, it would be wrong

to equate the balance of policy concerns at issue in an NLRA or LMRA case with the balance at issue in an LMRDA case; Congress did not purport to weigh an individual's statutory interest in freely participating in union affairs in the balance when it concluded, in Section 10(b) of the NLRA, that unfair labor practice claims should have a six-month statute of limitations.

Finally, the practical litigation problems that made resort to state law inappropriate in *DelCostello* are absent in LMRDA-Title I cases. Unlike the typically short state limitations periods governing vacation of arbitration awards rejected in *DelCostello,* the one-to-three year limitations periods commonly applicable to personal injury claims provide union members with adequate time to vindicate their LMRDA rights. Moreover, in contrast to the situation at issue in *DelCostello,* resort to state law will not, in the LMRDA context, result in two different limitations periods being applied to the same claim. Finally, a limitations period longer than six months is not too long; the LMRDA protects the rights of union members to participate freely in union affairs and, in the context of analogous civil rights claims, the Court has held that one-to-three year limitations periods do not undermine the stability of labor-management relations to an unacceptable degree.

ARGUMENT

The court of appeals erred in applying the six-month statute of limitations of the NLRA to a claim under Title I of the LMRDA. An LMRDA-Title I claim is best analogized to a civil rights claim. According to this Court's decisions, in cases involving such civil rights analogies, state statutes of limitations for personal injury actions should be applied to such claims. Concomitantly, the

reasoning of the Court in *DelCostello,* which applied the six-month statute of limitations of the NLRA to a hybrid breach of contract/duty of fair representation claim, is inapt in the LMRDA-Title I context. Accordingly, the contrary decision of the court below should be reversed.

1. Where a federal statute does not contain an express statute of limitations for actions brought under its civil enforcement provisions, as is true of Title I of the LMRDA,[5] this Court has said that it will " 'borrow' the most suitable statute or other rule of timeliness from some other source" (*DelCostello* v. *International Bhd. of Teamsters,* 462 U.S. at 158). To identify which limitations period it will borrow, the Court follows a two-step decision process. First, it determines whether "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding Corp.* v. *Malley-Duff & Assocs.,* No. 86-497 (June 22, 1987), slip op. 6 (quoting *Wilson* v. *Garcia,* 471 U.S. 261, 272 (1985)). Having made that judgment, it then "inquir[es] whether a federal or state statute of limitations should be used" (*Agency Holding Corp.,* slip op. 4), keeping in mind that, with respect to this inquiry, " 'resort to state law remains the norm' " and that a federal statute of limitations should be borrowed only when federal law " 'clearly provides a closer analogy than available state statutes' " and " 'the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking' " (*ibid.* (quoting *Delcostello* v. *International Bhd. of Teamsters,* 462 U.S. at 171-172)). Ap-

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[5] Section 102 of the LMRDA, 29 U.S.C. 412, provides that "[a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

plication of this two-step process leads, we believe, to a different conclusion than that reached by the court of appeals below.

With respect to the first prong of the inquiry, we are inclined to believe that a uniform statute of limitations is particularly appropriate for claims under Title I of the LMRDA. Title I creates a "bill of rights" for union members, protecting their rights to speak, assemble, have an equal vote in union affairs, participate in union meetings, receive a copy of collective bargaining agreements negotiated by the union, and have due process protection against unfair union discipline. See 29 U.S.C. 411-415, 529; see generally *Local 82, Furniture Moving Drivers* v. *Crowley*, 467 U.S. 526, 536-537 (1984); *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 109-110 (1982). As the decisions of the courts of appeals evidence, the various types of claims that may be brought under this "bill of rights" are similar to a wide range of common law and statutory causes of action. See, *e.g.*, *Clift* v. *UAW*, *supra* (applying limitations period for unfair labor practice charges under the NLRA); *Doty* v. *Sewall*, *supra* (applying limitations period for personal injury claims); *Trotter* v. *International Longshoremen's Union, Local 13*, 704 F.2d 1141 (9th Cir. 1983) (applying limitations period for liabilities created by statute); *Dantagnan* v. *ILA, Local 1418*, 496 F.2d 400 (5th Cir. 1974) (applying limitations period for breach of contract claims); *Sewell* v. *Grand Lodge of Int'l Ass'n of Machinists*, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972) (applying limitations period for tort claims). Thus, unless Title I claims are governed by a uniform characterization for limitations period purposes, there will likely be much unproductive litigation and considerable uncertainty for LMRDA plaintiffs and defendants. In similar circumstances, this Court

has said that there is reason to believe that Congress would have preferred that a single characterization be given to all claims arising under the federal statute. See *Wilson* v. *Garcia*, 471 U.S. at 274-275 (42 U.S.C. 1983); *Agency Holding Corp.*, slip op. 5-7 (RICO).

With respect to the second prong of the inquiry, the task of identifying an appropriate statute of limitations does not seem an especially difficult one. Title I of the LMRDA is a kind of federal "civil rights" statute "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution." *Finnegan* v. *Leu*, 456 U.S. 431, 435 (1982). Accord, *Doty* v. *Sewall*, 784 F.2d at 6; *Rodonich* v. *House Wreckers Union Local 95*, 817 F.2d 967, 976-977 (2d Cir. 1987); 105 Cong. Rec. 6471-6472 (1959) (statement of Sen. McClellan). In the context of other statutes securing similar basic civil rights against violation by state or private action, this Court has said that the state law limitations period relating to personal injury actions should govern. See *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 3-4 (two-year state statute of limitations governing personal injury claims applies to claims under 42 U.S.C. 1981); *Wilson* v. *Garcia*, 471 U.S. at 276-280 (three-year state statute of limitations governing personal injury claims applies to claims under 42 U.S.C. 1983). Unless there are convincing reasons to depart from this approach, it follows that the relevant state limitations period for personal injury actions should govern claims under Title I of the LMRDA as well. Such an approach was in fact taken in this case by the district court, which borrowed North Carolina's three-year limitations period for personal injury actions. See Pet. App. 39a (discussing N.C. Gen. Stat. § 1-52 (1987)).

2. The court below concluded that the reasoning of this Court in *DelCostello* v. *International Bhd. of*

Teamsters, supra, required that the six-month statute of limitations of Section 10(b) of the NLRA be applied to LMRDA-Title I claims. But the court below failed to appreciate the marked differences between the type of claim at issue in *DelCostello* and the type of claim at issue under Title I of the LMRDA. These differences render the reasoning of the Court in *DelCostello* inapplicable to LMRDA-Title I claims.

In *DelCostello,* the Court was presented with a hybrid action under Section 301 of the Labor-Management Relations Act (LMRA) (29 U.S.C. 185), alleging that the employer had breached a collective bargaining agreement and that the union had breached its duty of fair representation (462 U.S. at 163-164). In declining to apply a state law statute of limitations in that instance,[6] the Court in *DelCostello* stressed several factors that made Section 10(b) of the NLRA a "more apt [analogy] than any of the suggested state-law parallels" that might apply to the LMRA claim in that case (462 U.S. at 169 (footnote omitted)). Specifically, the Court noted that a "hybrid" breach of contract/duty of fair representation claim under Section 301 of the LMRA will often, if not always, also amount to an unfair labor practice under the NLRA (462 U.S at 170); that, in such a case, the LMRA and NLRA actions implicate an identical balance of interests—*i.e.*, " 'the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system' " (*id.* at 170-171 (citation omitted)); and that substantial practical problems

[6] The Court had previously borrowed from state law in setting the appropriate limitations periods for breach of contract actions by unions against employers under Section 301 of the LMRA. See *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

weigh against applying the available state law limitations periods for the breach of contract and unfair representation claim that are inextricably intertwined in this kind of Section 301 action (462 U.S. at 172; see also *id.* at 165-169).

Claims under Title I of the LMRDA, unlike hybrid breach of contract/duty of fair representation actions under Section 301 of the LMRA, will rarely, if ever, amount to unfair labor practices under the NLRA. LMRDA-Title I claims allege violations of "union democracy," and thus are concerned with the internal operation of the union—*i.e.*, the relationship between union members, the union, and union officers. See *Hester* v. *International Union of Operating Engineers,* 818 F.2d 1537, 1540 (11th Cir. 1987); *Doty* v. *Sewall,* 784 F.2d at 6-7; *Abrams* v. *Carrier Corp.*, 434 F.2d 1234, 1250-1251 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). Claims under the NLRA, on the other hand, generally relate to matters involving an employee's relationship with his employer; they ordinarily do not relate to an employee's relationship with the union structure. See *Kolinske* v. *Lubbers,* 712 F.2d 471, 481 (D.C. Cir. 1983); *Price* v. *UAW,* 795 F.2d 1128, 1133-1135 (2d Cir. 1986). An internal union matter may form the basis for an unfair labor practice charge only if it has a "substantial impact" on the employee's relationship with his employer or impairs a fundamental policy embedded in the NLRA. See, *e.g.*, *Pattern Makers' League* v. *NLRB,* 473 U.S. 95, 102-107 (1985); *International Bhd. of Teamsters, Local 310* v. *NLRB,* 587 F.2d 1176, 1183 & n.31 (D.C. Cir. 1978). Even then, however, the elements of such an unfair labor practice charge will be distinct from the elements of an LMRDA case arising out of the same set of facts. The unfair labor practice charge will focus on the unequal

employment status and impairment of NLRA policies allegedly caused by particular acts of the union, while the LMRDA claim will focus on the unequal opportunity to participate in union affairs allegedly caused by those or other actions of the union. See *Doty* v. *Sewall,* 784 F.2d at 6-7. Thus, while the unfair labor practice provisions of the NLRA provided an appropriate analogy for the LMRA claims at issue in *DelCostello,* where the LMRA claims also resembled unfair labor practice charges, the same cannot be said here.

For similar reasons, it is relatively clear that LMRDA claims will rarely, if ever, implicate the balance of interests presented by a hybrid breach of contract/duty of fair representation action brought under Section 301 of the LMRA (or its parallel unfair labor practice charge under the NLRA). Generally, as in this case, an LMRDA claimant does not challenge any part of the collective bargaining or grievance adjustment process. Rather, an LMRDA claimant generally challenges only internal union actions. See, *e.g.*, *Doty* v. *Sewall, supra* (denial of union membership to dissident); *Rodonich* v. *House Wreckers Union Local 95,* 817 F.2d 967 (2d Cir. 1987) (union discipline against members of rival political faction); *Local Union 1397* v. *United Steelworkers,* 748 F.2d 180 (3d Cir. 1984) (discipline imposed by international union on local union leaders); *Davis* v. *UAW',* 765 F.2d 1510 (11th Cir. 1985), cert. denied, 475 U.S. 1057 (1986) (expulsion of dissident union member). Such claims are entirely "freestanding" from the collective bargaining and grievance adjustment process. Accordingly, they cannot and do not involve the identical policy concerns that Section 10(b) of the NLRA seeks to balance.

To be sure, in some circumstances, as was true in *Clift* v. *UAW', supra,* an LMRDA claimant may challenge a

union action that has a causal nexus with the collective bargaining or grievance adjustment process. In such cases, the LMRDA claimants obviously will *want* to set aside the results of the collective bargaining or grievance adjustment process; and, to the extent their wishes are honored, their LMRDA claims, like the claims involved in *DelCostello*, will implicate the national interests in stable bargaining relationships and finality of private settlements that have informed the choice of limitations period under the NLRA and the LMRA. But the reality is that such relief will generally not be available to LMRDA claimants. Most retroactive relief relating to the collective bargaining or grievance adjustment process would exceed the "minor" and "ancillary" provisions of an injunction to which the employer, who is not regulated by the LMRDA (*American Postal Workers Union, Local 6885* v. *American Postal Workers Union*, 665 F.2d 1096, 1109 & n.26 (D.Cir. Cir. 1981); *Hayes* v. *Consolidated Service Corp.*, 517 F.2d 564, 566 (1st Cir. 1975)), could properly be subjected. See *DelCostello* v. *International Bhd. of Teamsters,* 462 U.S. at 168 n.17 (where employer cannot be sued, equitable remedy such as order to arbitrate cannot be imposed); *General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375, 399-401 (1982) (employer who has not violated substantive rights of plaintiff may only be subjected to "minor" and "ancillary" provisions of injunctive order against union). Rather, LMRDA plaintiffs will ordinarily be limited to relief solely against the union, which may include declaratory relief, injunctive relief, compensatory damages, and possibly punitive damages. See *Parker* v. *Local Union No. 1466, United Steelworkers,* 642 F.2d 104 (5th Cir. 1981); *Christopher* v. *Safeway Stores, Inc.*,

476 F. Supp. 950 (E.D. Tex. 1979), aff'd, 644 F.2d 467 (5th Cir. 1981).[8]

In any event, even in those circumstances where the available relief might implicate the collective bargaining or grievance adjustment process, the LMRDA claim, unlike the LMRA claim involved in *DelCostello*, will also involve an allegation that the union has deprived an individual of his statutorily-created right freely to participate in union affairs. Congress did not purport to weigh this interest in the balance when it concluded, in Section 10(b) of the NLRA, that unfair labor practice charges should be governed by a six-month statute of limitations. Accordingly, even if the "friction" associated with LMRDA claims can possibly be said to impair or threaten the collective bargaining or grievance adjustment process, it cannot be concluded either that such LMRDA claims are the same as those authorized by the NLRA or that the balance of policy concerns at stake is indistinguishable from the balance struck by Section 10(b) of the NLRA.

Finally, the practical litigation problems that concerned the Court in *DelCostello* and that made resort to state law inappropriate there are not present with respect to the LMRDA-Title I claims at issue here. In contrast to the very short state limitations period governing vacation of arbitration awards considered by the Court in *DelCostello*, most if not all states allow at least one year in which to file personal injury actions. Such a limitations period plainly provides aggrieved union members with

[8] Of course, claimants in such a case can still seek relief, including rescission or modification of a collective bargaining agreement, against the employer in their hybrid Section 301 action. Such relief, however, is subject to the NLRA's six-month limitations period.

adequate time for attempting to vindicate their LMRDA rights. Cf. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975) (borrowing one-year limitations period for enforcement of claim under 42 U.S.C. 1981). Moreover, unlike the LMRA claim at issue in *DelCostello*, which required proof of separate unlawful actions by both the employer and the union, LMRDA claims require proof only of unlawful action by a union. Thus, resort to state law will not result in two different limitations periods being applied to the same claim—*e.g.*, a 90-day arbitration statute for the claim against the employer, and a three-year malpractice statute for the claim against the union. See *DelCostello*, 462 U.S. at 157-158. Finally, a limitations period longer than six months is not inappropriate here, as it was in *DelCostello*, because LMRDA claims involve the added concern (absent in *DelCostello*) that the right of free participation in union affairs be secured. The Court has held equally long limitations periods appropriate for similar kinds of civil rights claims. See *Goodman* v. *Lukens Steel Co.*, *supra* (two-year limitations period applied to civil rights claim under 42 U.S.C. 1981); *Wilson* v. *Garcia*, *supra* (three-year limitations period applied to civil rights claim under 42 U.S.C. 1983).

3. In short, resorting to Section 10(b) of the NLRA rather than to state law for a statute of limitations to govern actions brought under Title I of the LMRDA does not appear to us to be appropriate. The considerations that made Section 10(b) a suitable limitations period for "hybrid" LMRA claims do not apply with the same force to *any* LMRDA claim. Furthermore, there is an appropriate state law analogy for *all* such LMRDA claims—*i.e.*, the limitations period governing state law personal injury actions. Finally, while *some* LMRDA claims may be tangentially related to the collective

bargaining and grievance adjustment processes, and thus have some potential for disrupting collective bargaining relationships to some small degree, *no* LMRDA claim has the potential for producing any greater degree of disruption than claims initiated under other federal civil rights statutes; and the Court has consistently held that those federal civil rights claims should be governed by state limitation periods relating to personal injury actions. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, *supra*. We do not see a sound basis for reaching a different conclusion here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 87-1031

In the

Supreme Court of the United States

October Term, 1987

G. P. REED,

Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ASSOCIATION FOR UNION DEMOCRACY AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In a suit by a union member solely against his union to enforce his right of free speech, should the Court deviate from the normal federal rule, which requires it to borrow the most analogous state statute of limitations, and instead rely on the six-month period for filing charges under the National Labor Relations Act, which is borrowed for "hybrid" duty of fair representation actions by an employee against both his employer and his union?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

Page

Page

Page

LEGISLATIVE MATERIALS:

Statutes:

Legislative History:

OTHER AUTHORITIES:

Page

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BRIEF FOR THE ASSOCIATION FOR UNION DEMOCRACY AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici file this brief because, although they agree with petitioner that the Court should not borrow a six-month statute of limitations, which has previously been borrowed for "hybrid actions" to enforce the duty of fair representation and collective bargaining agreements, to govern actions under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), they differ with petitioner about the legal analysis required to reach that result. Most important, *amici* believe that the inappropriateness of borrowing the six-month limitations period becomes most obvious only following a careful analysis of the historical origins, purposes, and litigation practicalities of the hybrid action on the one hand, and of LMRDA actions on the other. Both *amici* are well situated to advise the Court in that regard.

The Association for Union Democracy is a non-profit corporation founded in 1969 which seeks to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. No other organization devotes itself primarily to this objective.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, prominent educators in labor studies and labor law, and, of course, numerous union members. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal operations.

In the past, the Association has provided legal and other support in numerous controversies involving unions. Its experience leads it to conclude that a six-month statute of limitations is much too short to permit many rank-and-file union members to obtain needed judicial assistance when their leaders infringe their democratic rights.

Public Citizen is a public interest organization which was founded in 1971 by Ralph Nader. Attorneys for Public Citizen frequently represent union members who have been unable to protect themselves from undemocratic practices without invoking judicial authority. Public Citizen has found that, all too frequently, union members do not come to the realization that they *have* legal rights that can be enforced in the courts, and do not find legal representation, until well after six months have passed since their rights were violated.

STATEMENT

This is a free speech case in which petitioner, an elected officer of Local 1715 of respondent United Transportation Union ("UTU"), contends that respondents deprived him of compensation for "lost time," the leave without pay that he was required to take from his employment in order to perform his union duties, because he was a "company man" who was too accommodating to the company. Jt. App. 28, ¶ 3(b). Petitioner alleges that other officers who were allied with the union leadership were allowed compensation in the same circumstances in which such compensation was denied to him. However, he did not bring his suit until more than two years had passed following the denial of his intra-union appeal.

The district court held that, notwithstanding this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), which borrowed the six-month limitations period for hybrid actions, the LMRDA is fundamentally different from hybrid actions, both in terms of the rights provided, the practicalities of litigation, and the threat to the stability of labor-management dispute resolutions that concerned the Court in *DelCostello*. However, on interlocutory appeal, the court below refused to follow the general rule requiring that statutes of limitations be borrowed from state law, and therefore reversed. The court of appeals rejected the analysis in *Doty v. Sewell*, 784 F.2d 1 (1st Cir. 1986), the only appellate decision which carefully analyzes both the hybrid action and the LMRDA, and which concludes that the reasons that supported borrowing the six-month statute for the former do not warrant such borrowing for the latter.

SUMMARY OF ARGUMENT

As a general rule, the limitations period for a federal cause of action is to be borrowed from the most closely analogous state statute. This Court carved out what it characterized as a narrow exception to this general rule for the federal cause of action to enforce rights under collective bargaining agreements when a union has breached its duty of fair representation ("DFR"), which is implied by the National Labor Relations Act ("NLRA"). In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the Court decided that, because of the need to resolve disputes involving collective bargaining agreements in order to maintain labor peace, a short limitations period was required to allow the bargaining parties to be certain that their resolutions of such disputes were in fact final. Accordingly, it ruled that the time allowed for filing unfair labor practice charges under the NLRA — the six-month period of section 10(b) of the NLRA — would be borrowed for DFR suits. The Court emphasized, however, that the borrowing of state limitations period was to remain the norm, for labor as well as other federal claims.

This general rule, and not the narrow exception, applies to LMRDA claims. To be sure, any labor law claim could be said to have some connection to bargaining disputes. But if the result in *DelCostello* is to remain an exception rather than become the rule, the application of section 10(b) must be confined to claims which carry the same direct and immediate threat to the finality of bargaining compromises that DFR claims do. With very few exceptions, however, LMRDA claims do not threaten that finality. Indeed, they are fundamentally unlike DFR claims, which are based on workers' economic rights as employees and as members of a bargaining unit represented by a union, whereas LMRDA claims are founded on members' civil rights and political liberties as members

of the union. Moreover, the adoption of a short statute of limitations threatens the remedial objectives of the LMRDA, which depend entirely on the initiative of individual union members to find counsel and file suit to enforce the statute. Finally, given the tenuous connection between LMRDA claims and bargaining compromises, there is no countervailing justification for endangering the ability of union members to protect their rights, comparable to the need for finality in DFR actions.

Amici do not have strong views on which state limitations period should be selected, because all of the reasonable alternatives adequately permit the enforcement of the LMRDA. However, *amici* discuss the choices that might be made and suggest that a three year statute be borrowed from the North Carolina code.

ARGUMENT

THE COURT BELOW ERRED BY APPLYING A SIX-MONTH STATUTE OF LIMITATIONS TO FREE SPEECH CASES UNDER THE LMRDA.

A. *DelCostello*: Its History, Its Rationale, and Its Progeny.

With some exceptions, federal statutes do not contain their own statutes of limitations; rather, they must be borrowed from other sources. This Court has repeatedly declared that, as a general rule, courts should apply the most closely analogous state statute of limitations. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975); *Runyon v. McCrary*, 427 U.S. 160, 180 (1976). The determination of which state statute of limitations is to be borrowed frequently presents a difficult issue of characterization, because federal statutes

often create rights for which there is no exact state parallel. *See* Section C, *infra*. This Court has made clear, however, that mere difficulty of characterization is not a sufficient reason to abandon the effort. *DelCostello v. Teamsters*, 462 U.S. 151, 171 (1983); *Wilson v. Garcia*, 471 U.S. 261 (1985).

There is a narrow exception to the general rule, however, for cases in which the use of analogous state statutes would frustrate the implementation of national policies. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). As the Court held in *DelCostello*, the "hybrid" action against a union and an employer is one example. In order to place in context the reasons why this Court found it necessary to make an exception in that type of case, it is important to explain the precise role which "hybrid" actions play in federal labor law, and then to examine how they differ from LMRDA free speech cases such as this.[1]

Individual employees, as well as their unions, may sue under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, to enforce rights conferred on them by collective bargaining agreements between their employers and their unions. *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). But the Court has erected a significant procedural barrier to prevent the courts from being inundated with suits to enforce collective bargaining agreements — the plaintiff must exhaust contractual grievance procedures,

[1]Another exception is a civil action for violations of the RICO statute. *Agency Holding Corp. v. Malley-Duff & Assoc.*, 107 S. Ct. 2759 (1987). In *Malley-Duff*, the Court decided that, given the extraordinary variety of types of RICO claims, and the amount of time expended on litigation of the proper limitations period for each, it was necessary to establish a single period to govern all RICO claims. *id.* at 2763-2764. The Court decided that the four-year limitations period for antitrust claims not only provided a uniform rule, but provided a close analogy with RICO claims. *Id.* at 2764-2765.

including arbitration, before suit is filed. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). It has also erected a major substantive barrier to such suits — the courts will not overturn arbitral awards unless the award cannot possibly be justified as having drawn its essence from the collective bargaining agreement. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

But the Court has recognized that employees may be prevented from exhausting the contractual procedures, or may be unable to obtain a fair hearing in arbitration, if the union breaches its DFR either in deciding not to complete the contractual procedures or in the manner of conducting them. Accordingly, the Court has ruled that individual employees seeking to enforce their rights under a collective bargaining agreement will be excused from the exhaustion requirement, and from the highly deferential standard of review under *Enterprise Wheel*, if, but only if, they can show that the union breached its DFR in handling the grievance. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). A lawsuit in which employees seek to enforce both the collective bargaining agreement against the employer, and the DFR against the union, is known as a "hybrid" action.

The issue of the proper limitation period for hybrid actions first reached the Court in *UPS v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, the narrow question on which certiorari had been granted was which state statute was the most analogous for post-arbitration hybrid suits against employers alone, and the Court decided that the most analogous statute was that for suits to vacate arbitration awards. *Id.* at 61-62. Moreover, the Court expressed concern that, absent a fairly short limitations period, the parties to the collective bargaining agreement could not be sure that an arbitrator's resolution of a dispute under the agreement was in fact final. Thus, although

state limitations periods for enforcing contractual rights provided another analogous alternative, those statutes allowed too long a period in which the arbitrator's disposition of a grievance was in question, and their use would frustrate federal policy favoring prompt resolution of labor-management disputes. *Id.* at 63-64.

Two years later, in *DelCostello*, the question presented was whether to apply a federal limitations period instead of any of the state alternatives in hybrid suits against both an employer and a union. The Court reiterated its concern that several of the analogous state limitations periods, such as actions for tortious injury or for professional malpractice, were so lengthy that employer-union disputes, and the compromises by which they were resolved (including negotiated terms, settled grievances, or even arbitral adjudications), could remain in limbo for years, and thus could endanger stability in labor relations and, in the long run, labor peace. 462 U.S. at 168-169. The other most analogous state statutes, such as those applied to actions to vacate arbitration awards, were so short — generally three months — that they did not give enough time for aggrieved employees to initiate suit. *Id.* at 165-168. Moreover, the Court recognized that the most analogous state statutes were different for the employer and for the union, and if each were applied to their respective defendant, the result would be the application of different limitations periods to two parts of the same suit, which would clearly have been undesirable. *Id.* at 169 n.19.

Still, the Court said, "these objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." *Id.* at 169. However, it found that section 10(b) of the NLRA, 29 U.S.C. § 160(b), was more appropriate than any of the state analogies, both because it had been designed by Congress to accommodate a "very similar balance of interests," *i.e.*, employee rights versus the stability of private adjustment of labor disputes, and because the DFR was itself a cause of action implied from the NLRA. *Id.* at 169-171.

The Court was careful, however, to emphasize that the courts should not too readily decline to adopt state limitation periods simply because state law fails to provide a perfect analogy: "We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, *in labor law or elsewhere*. . . . [R]esort to state law remains the norm for borrowing of limitations periods [unless] a rule from elsewhere in federal law *clearly* provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make the rule a *significantly more appropriate* vehicle." *Id.* at 171-172 (emphasis added).[2]

Amici recognize that there are other labor law suits which, although not addressed by the Court in *DelCostello*, present such closely analogous situations that it may be appropriate to borrow the six-month period of section 10(b) instead of an analogous period from state law. Thus, for example, although *DelCostello* involved hybrid actions against unions and employers covered by the NLRA and LMRA, hybrid actions against unions and employers covered by the Railway Labor Act ("RLA") are so similar that the *DelCostello* reasoning would presumably apply to require the borrowing of a federal limitations period in such cases as well.[3]

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[2]Last Term, in *West v. Conrail*, 107 S. Ct. 1538 (1987), the Court cautioned against an overly mechanical reading of *DelCostello* to cut back as far as possible the time for initiating lawsuits, even for hybrid claims.

[3]We note that the Railway Labor Act contains an express two-year statute of limitations for suits to vacate arbitration decisions, 45 U.S.C. § 153, First (r), not a six-month period as in section 10(b) of the NLRA.

(footnote continued)

On the other hand, the courts of appeals that have considered the proper limitations period under section 303 of the LMRA, 29 U.S.C. § 187, in actions to enforce the secondary boycott provisions of the NLRA have opted not to apply the six-month period of section 10(b). *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (2d Cir. 1985); *Carruthers Ready-Mix v. Cement Masons Local 520*, 779 F.2d 320 (6th Cir. 1985); *Prater v. UMW*, 793 F.2d 1201, 1209-1210 (11th Cir. 1986). These courts applied longer limitations periods even though labor-management relations are directly affected by such suits and even though a secondary boycott, like a breach of the DFR, is an unfair labor practice for which Congress expressly prescribed a six-month limitations period for filing charges with the NLRB. Nevertheless, although the case for borrowing section 10(b) is far more compelling for cases under section 303, these courts concluded that the effect of such litigation on stable labor-management relations, and consequently on labor peace, is insufficient to warrant a departure from the normal rule of borrowing analogous state limitations periods.

Similarly, the limitations periods in employment discrimination cases have been borrowed from state law, *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975), despite the fact that such actions frequently call into question matters which had been settled between unions and employers. *Id.*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII case). The lower courts have continued to apply state limitations periods in such suits under 42 U.S.C. § 1981, even against unionized employers, citing the general rule

Nevertheless, every court that has ruled on the statute of limitations in hybrid actions under the RLA has chosen the NLRA's six-month limitations period. *E.g., Dozier v. TWA*, 760 F.2d 849, 851 (7th Cir. 1985). The question remains open in this Court. *West v. Conrail*, 107 S. Ct. 1538, 1541 n.2 (1987).

discussed in *DelCostello* as authority. *E.g., Howard v. Roadway Express*, 726 F.2d 1529, 1531 (11th Cir. 1984). *See also Goodman v. Lukens Steel Co.*, 107 S. Ct 2617, 2621 (1987).[4]

The question to be decided in this case, then, is whether the effect of LMRDA free speech litigation on stable labor-management relations is more like that of a hybrid action, or more like the many kinds of statutory labor causes of action held not to fall within the *Del Costello* exception. In making that determination, the Court should take as its point of departure its admonition in *DelCostello* that borrowing from state law remains the rule and not the exception, in labor law as elsewhere. 462 U.S. at 171-172. We suggest, indeed, that the Second Circuit, in a secondary boycott case, identified the correct standard for deciding whether a court should decline to borrow state statutes of limitations for a particular labor law claim: section 10(b) should apply only to suits which "inevitably involve an immediate and direct impact on labor-management relations." *Monarch Long Beach Corp. v. Teamsters Local 812, supra*, 762 F.2d at 231. This test, which is firmly rooted in the rationale of *DelCostello*, assures that the normal rule will be altered only in truly unusual situations. As we now show, no such departure is warranted for free speech cases under the LMRDA.

[4]The courts are divided over the question whether actions by unions against employers, or vice-versa, to enforce collective bargaining agreements, are governed by section 10(b) or by state limitations periods. *Compare Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222, 227-229 (7th Cir. 1986) (borrowing state statute), *with Federation of Westinghouse Unions v. Westinghouse Elec. Corp.*, 736 F.2d 896, 901-902 (3d Cir. 1984) (applying section 10(b)). *See also Adams v. Gould*, 739 F.2d 858, 866-867 (3d Cir. 1984) (borrowing state statute for member's suit to enforce collectively-bargained pension rights). Whatever the proper rule in those cases, they obviously have a far more direct impact on labor-management relations than do suits under the LMRDA to enforce union members' civil liberties.

B. The *DelCostello* Rationale for Borrowing a Six-Month Period for Hybrid DFR Suits Does Not Apply To LMRDA Claims.

In order to understand the differences between hybrid DFR actions and suits under the LMRDA, it is first necessary to review the objectives that Congress sought to accomplish by enacting the LMRDA. The LMRDA, and particularly Title I of the Act, was the product of hearings conducted in the late 1950's by the Senate Select Committee on Improper Activities in the Labor-Management Field, chaired by Senator McClellan. S. Rep. No. 187, 85th Cong., 1st Sess. 2 (1959). The McClellan Committee investigations revealed many different ways in which corrupt union leaders had dominated unions and remained unaccountable to their members. The Committee focused specifically on the problem of international union officers who "circumvent freedom of speech on the part of [a] local" by punishing local officers. *E.g.*, 2 NLRB, *Legislative History of the LMRDA* 1105 (1959) (Senator Mundt, citing the McClellan Committee Hearings).

Thus, Title I has been construed to effectuate its purpose of guaranteeing "the independence of the membership and the effective and fair operation of the union as the representative of its membership." *Hall v. Cole*, 412 U.S. 1, 8 (1973). *See also Musicians v. Wittstein*, 379 U.S. 171, 182-183 (1964) (objective is to achieve "full and active membership participation in the affairs of the union"). As explained by then-Chief Judge Lumbard, the fundamental objective of the Act is to promote "the members' rights to determine the course of their organization." *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967). The LMRDA's objectives are thus fundamentally different from those of the NLRA, which seeks to encourage the practice of collective bargaining and which in many respects subordinates the economic rights of individual employees in

order to achieve the collective good. *Emporium Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975); *Humphrey v. Moore*, 375 U.S. 335 (1964).

In light of these differences in objectives and functions between the LMRDA and the NLRA, LMRDA claims cannot properly be grouped with hybrid DFR actions for statute of limitations purposes, for two reasons which we more fully explain in the pages that follow. First, LMRDA claims are far less likely than hybrid suits, or, indeed, than most other kinds of labor law suits, to pose a direct and immediate threat to the finality of labor-management compromises or to stable labor-management relations. Second, an unduly abbreviated limitations period will likely make it much more difficult to enforce the LMRDA, contrary to Congress' intent that the principles of union democracy and responsibility be furthered by an enforcement mechanism which depends solely on the initiative of individual union members.

1. LMRDA Claims Do Not Pose an Immediate or Direct Threat to Labor Peace or to Labor-Management Compromises.

There are numerous differences between hybrid DFR actions and the great majority of LMRDA actions, all of which militate against borrowing the statute of limitations in section 10(b) for LMRDA suits. *See generally Doty v. Sewall*, 784 F.2d 1, 3-4, 6-7 (1st Cir. 1986); *Rodonich v. Laborers Local 95*, 817 F.2d 967, 976-977 (2d Cir. 1987); *Bernard v. Teamsters Local 435*, 587 F. Supp. 524 (D. Colo. 1984); *Testa v. Gallagher*, 621 F. Supp. 476 (S.D.N.Y. 1985); *Agola v. Hagner*, 120 LRRM 3279 (E.D.N.Y. 1985); *Rector v. Elevator Constructors*, 625 F. Supp. 174 (D. Md. 1985); *Maguire v. McQueen*, 122 LRRM 2449 (S.D.N.Y. 1986). The principal goal of most hybrid suits is to protect an employee's economic

rights under a collective bargaining agreement, generally in the form of reinstatement, back pay, or improved seniority. The union is sued because the worker must show a violation of the DFR as a precondition to the right to enforce the contract against the employer, *Vaca v. Sipes*, 386 U.S. 171 (1967), and because the union may bear responsibility for a portion of the resulting economic loss. *Bowen v. Postal Service*, 459 U.S. 212 (1983).

LMRDA suits, by contrast, seek to vindicate a union member's civil liberties or other political rights within the union, just as an action under section 1983 against a public official seeks to redress a violation of the constitution's Bill of Rights. Furthermore, unlike the DFR, which is inferred from the NLRA itself, rights under the LMRDA were directly provided for, precisely because Congress was dissatisfied by the failure of the NLRA, even as amended by the LMRA, to regulate internal union affairs and thus to protect union members from undemocratic abuses by their leaders. *See generally* McAdams, *Power and Politics in Labor Legislation* (1964). *See also Boilermakers v. Hardeman*, 401 U.S. 233, 237-241 (1971); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194-195 (1967). And in *DelCostello*, the Court relied on the fact that the NLRA, which itself contains a six-month limitations period, is the source of a union's DFR in deciding to apply the six-month period to hybrid actions. 462 U.S. at 170.

Another important difference between LMRDA and hybrid DFR actions is that, although the latter inevitably involve attacks on decisions resolving disputes between labor and management, which undermine the finality of these agreements, LMRDA actions normally do not involve such matters. Rather, the usual question is whether discipline was imposed without due process or a member's free speech rights infringed, sections 101(a)(2) and (5), 29 U.S.C. § § 411(a)(2)

and (5), whether dues were improperly increased, section 101(a)(3), 29 U.S.C. § 411(a)(3), whether a class of members was improperly denied the right to vote at a meeting, section 101(a)(1), 29 U.S.C. § 411(a)(1), whether union members have the right to examine books and records, section 201(c), 29 U.S.C. § § 431(c), or whether a union officer has misspent union funds. Section 501, 29 U.S.C. § 501. Not only do these issues not involve labor peace or collective bargaining, but it has been uniformly held that employers are not even proper defendants in such actions. *E.g., Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d 237, 239 (4th Cir. 1968). Thus, unlike DFR actions, most LMRDA suits have no direct impact on labor-management relations or on labor peace and stability.[5]

Some courts have stated that the outcome of LMRDA actions may affect labor-management relations in a way that is comparable to the outcome of a hybrid action, because the exercise of democratic rights of the LMRDA may lead to a change in union policy, whether by the election of new officers or otherwise. *Steelworkers Local 1397 v. Steelworkers*, 748 F.2d 180, 184 (3d Cir. 1984). But the fact that a union may change its policies does not mean that it has the right to overturn collective bargaining agreements or reopen grievances that have already been resolved with the employer. Indeed, Congress has decreed that local unions must hold elections at least every three years, 29 U.S.C. § 481(b), but that scarcely means that bargaining compromises made during one officer's term are destabilized by the possibility that the officer may be defeated in an election held during the term of the agreement. In sum, although LMRDA rights may indirectly affect the union's rela-

[5]Inasmuch as LMRDA suits cannot proceed against both employers and unions, the justification offered in *DelCostello* for resorting to federal law to find a single applicable limitations period, 462 U.S. at 169 n.19, also disappears.

tions with an employer, that effect is by no means comparable to the destabilizing effect of DFR actions, and a six-month statute of limitations is not needed to advance the policy underlying the NLRA of promoting stability in labor relations.

The court below borrowed the six-month limitations period because it feared that an internal union dispute "if allowed to fester," could "erode the confidence of union members in their leaders" or "distract union officials from their . . . representation of union members in their relations with employers." 828 F.2d at 1070. However, precisely these arguments were made to Congress in opposition to the Bill of Rights for Union Members (Title I), but Congress rejected them when it enacted the LMRDA. In essence, Congress decided that the risk of damage to a union's collective bargaining position was outweighed by the members' interest — and the public interest — in union democracy. *Navarro v. Gannon*, 385 F.2d 512, 518 (2d Cir. 1967).

As a theoretical matter, it is possible that the resolution of an LMRDA action might eventually have some indirect impact on the collective bargaining relationship between the defendant union and some employers. If, for instance, the LMRDA had prevented Jimmy Hoffa from imposing a trusteeship on an errant local when it refused to cooperate in one of his labor shakedowns of an employer, *see* 29 U.S.C. § 462, labor-management relations might have been affected. If a union cannot increase its dues because the membership does not want to pay for a larger strike fund, *see* 29 U.S.C. § 411(a)(3), perhaps the leadership will be more reluctant to call strikes. Or union officers may be more cautious in the way they use strike funds if they know that their expenditures can be called into question as excessive under a fiduciary duty theory. *See* 29 U.S.C. § 501. And if a union officer such as petitioner Reed cannot be subjected to discrimination because

he is considered by the union leadership to be a "company man," Jt. App. 28, ¶ 3(b), perhaps the result will be a less adversarial relationship with management. In this sense, *some* LMRDA actions may have *some* indirect impact on economic relations between unions and employers and on labor peace in *some* circumstances.

But in that sense, every labor case, including one involving racial discrimination under 42 U.S.C. § 1981, has such an impact. Yet in *DelCostello* the Court said that, in labor cases as elsewhere, the normal rule applies — *i.e.*, there is a strong presumption in favor of borrowing from state limitations periods instead of from federal law. 462 U.S. at 171-172. Thus, the mere existence of the Congressional policy favoring the rapid disposition of labor disputes, which is embodied in section 10(b), and which was a primary basis for applying that limitation period to DFR suits, does not require that section 10(b) be used in actions by union members under the LMRDA.

In another context, the lower courts have recognized the minimal impact which most intra-union disputes have on labor-management relations and on labor peace. Thus, until recently, most courts held that federal courts had no jurisdiction over suits to enforce a union constitution as a contract between labor organizations unless the dispute threatened industrial peace or had a "significant impact" on labor-management relations. *E.g.*, *Alexander v. Operating Engineers*, 624 F.2d 1235, 1238 (5th Cir. 1980). The courts have generally been reluctant to find that intra-union disputes in fact have such a significant impact; for example, in *Alexander*, the court found no significant impact even though the issue was whether a union should be liable in damages because its business agent allegedly executed a contract without the membership's approval. Although this Court has since held this distinction irrelevant to the enforcement of union constitutions, at least in cases

brought by local unions, *Plumbers Local 334 v. Plumbers*, 452 U.S. 615 (1981), the analysis in cases such as *Alexander* is plainly inconsistent with the assumption that all intra-union disputes about free speech rights must inevitably have such a direct and immediate effect on labor-management relations as to warrant borrowing the statute of limitations from section 10(b).

There is evidence in the LMRDA itself that suggests that Congress did not contemplate a short statute of limitations in private civil actions under the statute. Thus, in Title III, Congress established a presumption that, absent clear and convincing evidence to the contrary, a trusteeship was lawful if suit is filed within the first 18 months after the trusteeship is established. After 18 months, by contrast, there is an opposite presumption — *i.e.*, that the trusteeship was unlawful. 29 U.S.C § 464(c). Yet trusteeships are often imposed because of disputes between locals and internationals about bargaining matters, *e.g.*, *Roland v. Airline Employees*, 753 F.2d 1385 (7th Cir. 1985); 29 U.S.C. § 462 (proper purpose for trusteeships is to assure acceptance of contract "concessions" negotiated by national union). Moreover, litigation over the authority of a trustee, who takes over a local union and conducts its negotiations with employers, is far more likely than most Title I suits to affect relations between a union and the employers with which it bargains. *E.g.*, *Moody v. Longshoremen*, 112 LRRM 2340 (N.D. Ohio 1982); *cf. 1820 Central Park Avenue Restaurant Corp.*, 271 NLRB 378, 378 n.3 (1984) (suggesting that trusteeship might affect employer's duty to bargain). Inasmuch as Congress plainly intended suits under Title III of the LMRDA to be filed more than 18 months after trusteeships are imposed, it is highly unlikely that Congress intended a six-month limitation period for suits under Title I of the same Act.

Admittedly, there is a small class of LMRDA cases which may have a direct and immediate impact of the kind present in *DelCostello*. Typically, in such cases, an LMRDA claim is appended to a DFR suit as an alternate theory by which the plaintiffs urge the court to overturn a collective bargaining agreement on the ground that it was not properly ratified by the union membership. Most of the early post-*DelCostello* decisions which applied section 10(b) to an LMRDA claim involved that sort of contention. *See Adkins v. Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *Vallone v. Teamsters Local 705*, 755 F.2d 520 (7th Cir. 1984); *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984). However, the possibility that occasional LMRDA claims might pose a direct and immediate threat to a labor-management compromise scarcely provides justification for applying a six-month limitations period to the remaining bulk of LMRDA suits which pose no such danger.[6]

Some courts have held that section 10(b)'s limitation period should be applied to LMRDA cases because the NLRB has extended section 7 to protect the right of union members to engage in dissident activity, and so the LMRDA is said to have a "family resemblance" to unfair labor practices and to the DFR. *E.g.*, *Steelworkers Local 1397*, 748 F.2d at 183, *citing Steelworkers Local 1397*, 240 NLRB 848, 849 (1979); *Reed v. UTU*, 828 F.2d at 1070. This argument is incorrect for two reasons. First, under *DelCostello*, the only "resemblance"

[6]We doubt that such LMRDA claims will frequently be brought more than six months after the alleged wrongful act, both because the courts are reluctant to award damages in such cases, *Acri v. Machinists*, 781 F.2d 1393 (9th Cir. 1986), and because the only useful injunctive relief at that point would have to apply to the employer, who cannot be held liable under the LMRDA. Thus, effective relief can only be obtained before the contract has been implemented. *E.g.*, *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984). *See generally* Levy, *Membership Rights in Union Referenda to Ratify Collective Bargaining Agreements*, 4 Hofstra Lab. L.J. 225, 258-265 (1987).

that warrants adoption of the extraordinarily short six-month period would be a similarity in effect on national labor policy; yet, as we have shown above, the connection between most LMRDA actions and the consensual process of bargaining and grievance adjustment is at most indirect. Second, unlike the DFR, which is almost by definition an unfair labor practice, most LMRDA actions find no parallel in the NLRA. Thus, in *Steelworkers*, as in almost all NLRB cases where a union was found to have committed an unfair labor practice by punishing a dissident, the unlawful activity of the union related to employment rights, such as threatening to refuse to process a dissident's grievances and asking the employer to discharge a dissident. *Steelworkers Local 1397*, 240 NLRB 848, 849 (1979), *and cases cited*. *See also Teamsters Local 745*, 240 NLRB 537 (1979) (threat of violent retaliation).[7]

Admittedly, if a union officer assaults a member or causes him to be discharged or otherwise mistreated by the employer in retaliation for the exercise of Title I rights, that violates section 101(a)(2) of the LMRDA, *e.g.*, *Shimman v. Frank*, 625 F.2d 80, 90-91 (6th Cir. 1980); *Murphy v. Operating Engineers Local 18*, 774 F.2d 114, 123 (6th Cir. 1985), as well as section 8(b)(1)(A) of the NLRA. However, not only do such cases represent a minute portion of the cases that may be filed under Title I, but it is precisely because Congress was dissatisfied with the extent of protection afforded union dissenters by the NLRA that it enacted Title I of the LMRDA and gave union members the right to go to court over their mistreatment at the hands of union leaders. In those

[7]In some cases, the Board found a violation of the NLRA when unions fined workers for being dissidents. *E.g.*, *Carpenters Local 22*, 195 NLRB 1 (1972). More recently, the Board has recognized a congressional policy "not to interfere with the internal affairs of unions, aside from regulations affecting employment status." *East Texas Motor Freight*, 262 NLRB 868, 870 (1982).

circumstances, even if the NLRB has now expanded its own doctrines to address some of the problems that it had neglected in 1959, it would be odd indeed to start borrowing limiting principles from the very statute that Congress deemed inadequate, in order to reduce the impact of the LMRDA on union interests. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985) (Court declines to borrow limitations period for state remedies for wrongs by public officials, because "[i]t was the very ineffectiveness of state remedies that led Congress to enact the . . . Act in the first place").

In summary then, the vast majority of LMRDA claims in general, and Reed's claims in particular, do not pose a direct or immediate threat to labor-management compromises or to labor peace, and hence application of the six-month limitations period of section 10(b) is unwarranted.

2. A Six-Month Limitations Period Threatens the Enforcement of the Union Democracy Provisions of the LMRDA.

Although delay in the filing of LMRDA suits does not pose a threat to stable labor-management relations, a statute of limitations as abbreviated as six months does pose a significant threat to union members' access to judicial protection. This Court recognized the problem in *DelCostello*, where it discussed the difficulty that members have in deciding whether their rights have been violated, in finding counsel in a field in which almost all of the specialists represent either unions or employers, in finding money to pay the lawyer, and in performing all of the investigative and other prerequisites to suing. 462 U.S. at 166. It was also considerations of this kind that led the Court, in *Burnett v. Grattan*, 468 U.S. 42 (1984), to decline to borrow a *state* six-month limitation period applicable to state administrative discrimination claims, to determine the

time for filing a complaint under 42 U.S.C. § 1981 in federal court. *Id.* at 49-52.

There are other elements of LMRDA cases that make a short statute of limitations inappropriate. For instance, in a hybrid action, a worker who has already been discharged may have nothing to lose and much to gain by filing suit against his union and his employer. By contrast, an employee who believes that his LMRDA rights have been violated by his union, but who has not lost his job, may have good reason to think twice before going to court over an abstract principle of justice and democracy, or to recover a few dollars in unlawfully collected or misspent union dues. If he decides to go to court, he must sue a labor official who controls hiring hall referrals, decides whether or not to process grievances, and constantly trades away benefits of one group of members in order to obtain benefits for others. Thus, most workers are justifiably cautious about stepping forward to confront their leaders.

Moreover, in many LMRDA cases the individual plaintiff who prevails receives few tangible benefits, if any. Unlike a DFR case, in which the plaintiff's injury is primarily economic, and the principal relief sought is reinstatement and damages for the denial of employment opportunities, in an LMRDA case the member rarely has any significant economic interest at stake. Rather, the principal beneficiaries are the union membership as a whole and the public interest in honest and democratic unions. *Hall v. Cole*, 412 U.S. 1, 7-8 (1973). For example, Reed's case involves reimbursement of barely more that $1,000. In these circumstances, a statute of limitations that allows a very short time for deciding whether to undertake the risks of suing will inevitably have the effect of unduly limiting the enforcement of the Act. *Doty*, 784 F.2d at 9. And yet, unlike the DFR which can be enforced by the NLRB, the

LMRDA is enforced solely by suits filed by individual union members who have hired a lawyer to represent them. It is for these reasons, among others, that commentators as diverse as Archibald Cox, counsel to the draftsmen of the LMRDA, and Florian Bartosic, former general counsel of the Teamsters Union, have urged sensitivity to the difficulties which rank-and-file union members will have in serving as the sole means of enforcement of the Act. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 853 (1960); Bartosic, *Union Fiduciaries, Attorneys, and Conflicts of Interest*, 15 U.C. Davis. L. Rev. 227, 359-360 (1982).[8]

Accordingly, because applying a limitations period as short as six months would imperil Congress' objectives in passing the LMRDA, in ways which a similar limitations period does not undermine enforcement of the DFR, the Court should not adopt the six-month period in section 10(b) for LMRDA actions, even if the other concerns that motivated the Court in *DelCostello* to borrow it for hybrid actions were applicable.

C. The Proper State Limitations Period.

Amici's principal objective in this case is to persuade the Court not to extend the *DelCostello* exception to Title I of the LMRDA. *Amici* do not have strong views about which state limitations period should be borrowed, in this case or elsewhere, because a limitations period of two, three, or four

[8]By contrast, Congress has provided that union elections may be challenged by the Secretary of Labor, and a short statute of limitations is provided for such cases. 29 U.S.C. § 482.

years will suffice to protect Congress' objective of establishing effective democratic rights for union members.[9]

We recognize that the Court has recently moved in the direction of adopting uniform limitation periods for broad classes of suits, in order to reduce the burdens imposed on the courts and the parties by litigation over the proper limitation periods for fact-specific claims. *Wilson v. Garcia*, 471 U.S. 261 (1985) (42 U.S.C. § 1983); *Agency Holding Corp. v. Malley-Duff & Assoc.*, 107 S. Ct. 2759 (1987) (RICO). Title I has not produced nearly the outpouring of litigation spawned by section 1983 or by RICO, and thus might present a less compelling case for a uniform limitations period, perhaps because many of its claims seek injunctive relief for which laches may be the applicable doctrine. On the other hand, there are clear benefits to be gained from a predictable statute of limitations period for all potential Title I claims, so that the parties can have some certainty in advance when a specific claim, whose limitations period has not been litigated, will become untimely.

If the Court does opt for a uniform limitations period for all Title I claims, North Carolina's three-year limitations period for personal injury limitations, N.C. Gen. Stat. § 152(16), seems to be the most closely analogous. It is true that Title I claims may relate to what may seem to be a variety of subjects, including economic issues such as blacklisting of dissidents, monetary issues such as disciplinary fines and dues levels, and political issues such as the right to speak at union

[9]However the Court rules on limitations periods for Title I claims, it should not try to fix a uniform limitations period for claims under other titles of the LMRDA. There are provisions for private civil actions under several of the other titles which may raise different considerations from those raised by Title I suits. *E.g.*, section 201(c), 29 U.S.C. § 431(c) (right to inspect union records); section 501, 29 U.S.C. § 501 (fiduciary duties of union officers). *See Erkins v. Bryan*, 785 F.2d 1538, 1543 (11th Cir. 1986).

meetings or to vote on bylaws amendments. Despite these apparent differences, the one thing which all Title I cases have in common is that individual members' civil rights or civil liberties, conferred by the "Bill of Rights of Members of Labor Organizations," have been infringed. Indeed, the rationale for enacting this congressional charter for union democracy was that Congress had given unions certain powers over their members, and thus it was fair to subject unions to some of the same kind of restraints that confine the power of public authorities. In this sense, Title I provides a cause of action for union members to enforce certain constitutional rights against their unions, much as section 1983 provides a cause of action whereby persons may enforce their constitutional rights against improper state action. Thus, for the same reasons that the Court has borrowed the state limitations period for personal injuries for civil rights actions under sections 1983 and 1981, *Wilson v. Garcia*, 471 U.S. 261 (1985); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2620-2622 (1987), it would be appropriate here to borrow the North Carolina statute of limitations for personal injury claims.

If, on the other hand, the Court does not determine to adopt a uniform limitations period for all Title I claims, then three possibilities present themselves here. The Court might borrow the state limitations period for personal injury claims, on the theory that the fundamental issue in this case is whether the union was trying to suppress petitioner's personal rights. N.C. Gen. Stat. § 1-52(16). Or it might borrow the state's catch-all statute of limitations for rights conferred by statute, because petitioner seeks to enforce rights contained in a federal statute for which North Carolina has not specified a limitations period. N.C. Gen. Stat. § 1-52(2). Or, insofar as petitioner seeks to obtain payment for work done for the union that would have been paid pursuant to the union's normal practice, ab-

sent the union's improper motive, the Court could conclude that the state limitations periods for quantum meruit or contract actions is the most closely analogous. N.C. Gen. Stat. § 1-52(1). In this case the result would be the same under any of these alternatives, because the North Carolina statute of limitations for all of these causes of action is three years, but that is unlikely to be true in every state.

But whether the Court opts for a broad uniform limitations period, or for a more claim-specific approach, there are a number of acceptable analogies to state law causes of action that serve the Congressional objective of effective, enforceable union democracy rights, and that do not injure the national labor policy favoring expeditious resolution of contract disputes between unions and employers. Accordingly, there is no need to borrow the extraordinarily short six-month period contained in section 10(b) of the NLRA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 87-1031

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

G. P. REED,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

STATUTES

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

MISCELLANEOUS:

TABLE OF AUTHORITIES—Continued

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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether civil actions brought under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) should be subject to the statute of limitations governing duty of fair representation suits and unfair labor practices as set forth in § 10(b) of the National Labor Relations Act (NLRA), or, instead, to the various state statutes of limitations governing personal injury actions. Under this Court's decisions, the answer to that question turns on whether federal law or state law provides a closer analogy to LMRDA Title I actions, and on whether federal law or state law would better effectuate federal policy. Pp. 3-5 *supra.*

That Title I bears a strong "family resemblance" with both the union unfair labor practice provisions of the NLRA and with the duty of fair representation is undeniably. All of these rest on the same premise: Congress, having recognized and regulated the right of unions under the NLRA and the Railway Labor Act (RLA) to act as exclusive representatives, determined that it was necessary to assure that in various contexts unions use that authority to benefit the represented employees. That premise is clear from the structure and legislative history of the LMRDA as well as the decisions of this Court discussing that Act; indeed the legislative materials show that in enacting the LMRDA Congress acted for the purpose of remedying abuses "which distort and defeat the policies of the Labor Management Relations Act . . . and the Railway Labor Act," and Congress viewed "the conduct prohibited" to be "generally comparable to conduct described as an unfair labor practice." And because the LMRDA's form and its *raison d'etre* derive from the system of exclusive representation which is a unique, integral part of the national labor policy, that Act has no analog in ordinary state law. Pp. 8-17 *infra*.

This Court's decisions, as well as the decisions of the lower courts and of the National Labor Relations Board (NLRB), likewise make plain that there is a "substantial overlap" of coverage between LMRDA Title I on the one hand, and the NLRA unfair labor practice provisions and the duty of fair representation on the other. This overlap is clearest in those cases involving union conduct that affects a union member's employment rights, as for example, when a union is alleged to have retaliated against a dissident member in the operation of a hiring hall or in the processing of a grievance, or when a union is alleged to have sought to blacklist or procure the discharge of a dissident member. Such an allegation states a claim for relief under Title I, the duty of fair representation, and NLRA §§ 8(b)(1)(a) & (b)(2).

Even absent any employer involvement or any effect on employment, internal union discipline of a member can be said to "restrain or coerce" within the meaning of NLRA § 8(b)(1)(A) and thus can violate that provision if the discipline is motivated by the member's exercise of a § 7 right. And because § 7 protects much activity that is also privileged by LMRDA Title I, at least in theory virtually all Title I claims alleging discipline based on "dissident" activities can be brought as a § 8(b)(1)(A) charge as well. Indeed, the NLRB has held that a union violates that section by disciplining a union member for *e.g.*, the member's political activity within the union, for calling an ad hoc membership meeting to debate union policies, or publishing a newsletter critical of the union leadership. Pp. 17-22 *infra*.

In light of the foregoing, it follows that borrowing the § 10(b) limitations period for LMRDA claims will best effectuate federal policy. To do otherwise would mean that many, possibly most, Title I plaintiffs could prosecute stale NLRA § 8(b) or fair-representation claims under Title I, and thereby undermine the established policies favoring repose as to these other actions. Moreover, given that Congress passed the LMRDA to perfect the federal scheme of collective bargaining, there is every reason to believe that the Title I limitations period should faithfully reflect the policy favoring the relatively rapid disposition of labor disputes. Indeed, rapidity and repose are especially important in the LMRDA context because Title I suits can put in issue the identity of the union officers, the policies of the union, and the validity of the union's labor contracts. Allowing stale claims to linger could undermine the union's ability to represent its members in bargaining and ultimately the collective-bargaining system itself. And since, as this Court has concluded, the NLRA § 10(b) period is sufficient to provide a plaintiff with a fair opportunity to litigate his claim, that statute of limitations should be borrowed for LMRDA Title I actions. Pp. 22-29 *infra*.

ARGUMENT

Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 411-15 guarantees all members of labor organizations that are acting (or seeking to act as) as bargaining representatives in industries covered by either the National Labor Relations Act ("NLRA") or the Railway Labor Act ("RLA") various rights to participate in the deliberations and governance of those organizations. These provisions are, in the main, enforced through private civil actions brought by members against their labor organization. *See* 29 U.S.C. §§ 412 & 529.

As is often the case with federal statutes, LMRDA Title I does not provide an express statute of limitations for private civil actions instituted thereunder. This case presents the issue of whether, to fill that void, Title I civil actions should be subject to the six-month limitations period of § 10(b) of the NLRA, 29 U.S.C. § 160(b)—which was held in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), to govern employees' duty of fair representation suits against unions—or instead, to the various state statutes of limitations governing personal injury actions.[1]

1. *Federal "Borrowing" Doctrine.* The legal framework for deciding such a choice of statute of limitations issue is clear. Where Congress has established a cause of action without specifically establishing a statute of limita-

[1] Five courts of appeals, including the court below, have determined that § 10(b) should govern Title I actions. *See Reed v. UTU*, 828 F.2d 1066 (4th Cir. 1987); *Clift v. UAW*, 818 F.2d 623 (7th Cir. 1987), petition for cert. pending, No. 87-42; *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986); *Adkins v. International Union of Elec. Workers*, 769 F.2d 330 (6th Cir. 1985); *Local 1397 v. United Steelworkers*, 748 F.2d 180 (3d Cir. 1984). One court of appeals has rejected the use of § 10(b). *Rodonick v. House Wreckers*, 817 F.2d 967 (2d Cir. 1987). And, one court of appeals has drawn a distinction between LMRDA claims related to duty of fair representation claims, *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984) (applying § 10(b)) and "freestanding" LMRDA claims, *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986).

tions the "task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *Agency Holding Corp. v. Malley-Duff & Associates*, 55 L.W. 4952, 4953 (1987), quoting *DelCostello, supra*, 462 U.S. at 158. In so doing, the Court's "fallback rule of thumb" is to look to state law; the court does so "on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions." 462 U.S. at 158 n. 12.

"But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). As the Court concluded in *Occidental Life*, "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." 432 U.S. at 367. In *DelCostello*, the Court following this principle, borrowed § 10(b), the NLRA limitations period on unfair labor practice charges, as the proper limitation in an employee's suit against his or her union for breach of the duty of fair representation as implied from the scheme of the NLRA.

The Court based this conclusion on the answers to two interrelated inquiries: *first*, does a federal limitations rule or a state rule correspond to a more closely analogous cause of action; and *second*, which limitations rule is more appropriate in terms of fairly effectuating federal policy.[2] Because the Court deemed that a duty of

[2] *See, e.g.*, 462 U.S. at 172:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than the available state statute and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

See also Agency Holding Corp., supra (applying *DelCostello* formulation to determine that federal rule should govern civil RICO actions).

fair representation suit is in terms of policy and coverage closely analogous to a union unfair labor practice charge and has "no close analogy in ordinary state law," 462 U.S. at 165, and because the Court deemed use of § 10(b) more appropriate in policy and practical terms, the Court borrowed the federal rule.

All courts that have "borrowed" § 10(b) for use in Title I suits have done so on the authority of *DelCostello*.[8]

[8] Another issue under the borrowing doctrine "is whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Agency Holding Corp., supra*, 55 L.W. at 4953, quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). Where one statute "encompass[es] numerous and diverse topics and subtopics," *Wilson, supra*, 471 U.S. at 273, such that there will often be doubt as to the characterization of a given case, a uniform characterization should be applied "to avoid intolerable 'uncertainty and time consuming litigation.'" *Agency Holding Corp., supra*, 55 L.W. at 4953, quoting *Wilson, supra*, 471 U.S. at 272.

No participant in this case has argued that Title I claims should be analyzed on a case-by-case basis. Both Petitioner and the United States argue that a uniform rule is appropriate. Brief for the Petitioner ("Pet. Br.") at 53; Brief for the United States ("U.S. Br.") at 12-13. The Association for Union Democracy and Public Citizen (collectively "AUD") take no position on this issue. AUD Br. at 23-26.

We strongly believe that a uniform rule is appropriate. This Court has previously noted that "Title I litigation [involves] 'facts and circumstances admitting of almost infinite variety.'" *Hall v. Cole*, 412 U.S. 1, 11 (1973), quoting *Gartner v. Soloner*, 384 F.2d 348, 353 (3d Cir. 1967). The confusion and uncertainty that case-by-case characterization would generate is amply demonstrated by the confusion and uncertainty that did exist in the lower federal courts prior to *DelCostello*. *See, e.g., Capitas v. Retail Clerks*, 618 F.2d 1370 (9th Cir. 1980) (California three-year statute governing actions over "liability created by statute"); *Howard v. Aluminum Workers*, 589 F.2d 771 (4th Cir. 1978) (Virginia two-year tort statute); *Dantagnan v. I.L.A., Local 1418*, 496 F.2d 400 (5th Cir. 1974) (Louisiana ten-year contract statute); *Sewell v. Machinists*, 445 F.2d 545 (5th Cir. 1971) (Alabama one-year tort statute); *Hiura v. Electrical Workers, Local 1186*, 527 F. Supp. 1340 (D. Hawaii 1980) (six-year debt statute); *Mitchell v. Local 346, International Brotherhood of Electrical Workers*, 100 LRRM 2953 (W.D. Wash. 1979) (either two-year statute for "actions for relief not otherwise provided for" or three-year tort statute); *Fehd v. Keebler Co.*, 98 LRRM 2329 (N.D. Ga. 1978) (two-year statute governing actions seeking backpay).

2. *The Close Relationship of LMRDA Title I to the NLRA, the RLA and to the Federal Labor Policy Generally.* The first step in determining the proper statute of limitations here is to compare the plaintiff's underlying cause of action and the policies that cause of action embodies, with those of the state and federal actions offered as analogs.

In pursuing this inquiry, the *DelCostello* Court determined that while the duty of fair representation, which is implied from the NLRA/RLA scheme of exclusive collective-bargaining representation, 462 U.S. at 164 n.14, has "no close analogy in ordinary state law," 462 U.S. at 165, that duty does share a "family resemblance [that] is undeniable, and indeed . . . a substantial overlap" of coverage with the NLRA's union unfair labor practice provisions governed by § 10(b), 462 U.S. at 170. The Court noted that "duty of fair representation claims are allegations of unfair, arbitrary and discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions." *Id., see* 29 U.S.C. § 158(b)(1)(A) and (2).

By the same token, the policies behind the LMRDA are intimately related to the same federal labor policy expressed in the NRLA and the RLA and Title I plays a role in that policy that, although not identical, is closely analogous to the duty of fair representation and the NLRA union unfair labor practice provisions referred to in *DelCostello*. All of these rest on the same premise: Congress, having recognized and regulated the right of unions under the NLRA and RLA to act as exclusive representatives, determined that it was necessary to assure in various contexts that unions use that right to benefit the represented employees.

It is for this reasons of *labor* policy that Congress has acted to regulate the internal structure of private-sector labor unions, while leaving the internal structure of most other private voluntary associations largely unregulated. The system of regulation thus has no analog in ordinary state law since its form and its *raison d'etre* derives from the system of exclusive representation, which is a unique integral part of the collective bargaining policy of our national labor relations scheme.

a. Taken together, the NLRA and the RLA establish as federal policy a system of industrial democracy through collective bargaining. First, employees are guaranteed the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for . . . the purpose of collective bargaining." 29 U.S.C. § 157. Once so empowered, those employees can, through majority action, designate labor organizations to bargain with their employers:

> National labor policy has been built on the premise that by . . . acting through a labor organization freely chosen by the majority, the employees of the appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions." [*NLRB v. Allis-Chalmers*, 388 U.S. 175, 180, (1967).]

A labor organization so designated gains a legally conferred power of exclusive representation. Although the system is correctly premised on the belief that exercise of that power immeasurably enhances the bargaining position of the employees as a group, exclusive representation also significantly and necessarily alters the legal rights of each individual in the group:

> The policy extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment. . . . The employee may disagree with many of the union decisions but is bound by them. The majority-rule concept is today unquestionably at the center of our federal labor policy. [*Allis-Chalmers, supra*, 388 U.S. at 180.]

It is the establishment of majority rule and its effect on individual rights that creates the tension that—over the years—has repeatedly led to certain refinements in this scheme. The duty of fair representation, the provisions of NLRA §§ 8(b)(1)(A) and (2), and the LMRDA, must all be understood in these terms: each is premised on the notion that exclusive representation will only serve its humane goal of enhancing employee welfare, industrial democracy, and stability if the bargaining representative is constrained to act for the benefit of those for whom the representative is authorized to bargain. A more complicated system of balanced interests thus emerges, with the bargaining representative granted significant powers and legal protections, but made subject to certain public policy limits. Together, these grants and limitations take into account the employee group's need for effective power and the dangers of that power's abuse.

The first comprehensive articulation of this system of balances may be found in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) where this Court first inferred from the exclusive representation power, a corresponding duty of fair representation. Although an exclusive representative's status is the result of majority choice, once chosen,

> [t]he organization . . . [must] represent all its members, the majority as well as the minority, and it is to act for and not against those whom it repre-

> sents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf. [*Id.* at 202.]

It should be noted, however, that in defining the duty's scope, the Court has always recognized that the duty must be limited by the nature of the exclusive representative's legitimate needs as a representative. Thus, for example: "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." *Ford v. Huffman*, 345 U.S. 330, 338 (1953).

The adoption in 1947 of union unfair labor practice provisions that limit a union's ability to use its powers to "restrain or coerce" individual employees follows much the same rationale. As *DelCostello* noted, like the duty of fair representation, these provisions were designed to prevent "unfair, arbitrary or discriminatory treatment of workers." 462 U.S. at 170. Like the duty, these provisions were, moreover, intended to operate within Congress' continued commitment to the system of exclusive representation. Thus, although § 8(b)(1)(A) declared that unions could not "restain or coerce . . . employees in the exercise of [protected] rights", its proviso reserved to unions the power to "prescribe [their] own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A). The proviso reflected that

> Integral to . . . federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. * * * Congress [did not] limit[] unions in the powers necessary to the discharge of their role as exclusive statutory bargaining

> agents. . . . [*Allis-Chalmers, supra*, 388 U.S. at 181-183.]

The understanding that LMRDA Title I is part of the same tradition—*viz.* the tradition of balancing the need for constraints on the power of the exclusive representative to protect against abuses, while protecting that power's continued effective use for legitimate ends— is well accepted. For example, Archibald Cox—who, as a principle advisor to the Senate Labor Committee, drafted much of the LMRDA—explained in his leading article on the Act how its origin's are clearly found in the exclusive representation power:

> In retrospect it seems plain that the enactment of the LMRDA became inevitable when Congress, by enacting the Wagner Act, not only granted employees the right to bargain collectively but also transported the political principle of majority rule into labor-management relations by giving the union designated by the majority the exclusive right to represent all the employees in an appropriate unit. . . . The government which confers this power upon labor organizations has a duty to insure that the power is not abused. [Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 819-20 (1960).]

The most telling evidence that Congress rested the LMRDA on this pre-existing national labor policy is in the text of the statute itself. For example, the statute begins with a "Congressional Declaration of Findings, Purposes, and Policy," 29 U.S.C. § 401, which declares both a continued congressional commitment to the policies of collective bargaining representation set out in the NLRA and RLA, § 401(a), and a determination that the LMRDA would correct certain abuses "which distort and defeat the policies of the Labor Management Relations Act . . . and the Railway Labor Act." 29 U.S.C. § 401(c).

The LMRDA's scope of coverage reinforces the connection to pre-existing labor policy. The Act only regulates

labor organizations governed by the NLRA or RLA, 29 U.S.C. §§ 401(i) and (j), and Senator Goldwater, who sponsored the amendment that specifically excluded public-employee unions from coverage—and thus limited coverage to NLRA and RLA unions—made clear that this decision in large part rested on the nature of the federal labor law's exclusive-representation principle:

> Inasmuch as these [public employee] unions, in most instances, do not have the right . . . to compel their governmental employers to bargain with them, . . . I believe they should be free from the regulations imposed by the new bill. [105 Cong. Rec. A8510 (1950), reprinted in II NLRB, Legislative History of the LMRDA ("Leg. Hist.") 1844.]

Not surprisingly, references to the LMRDA's roots in the exclusive-representation system are plentiful throughout the legislative history. Indeed, Title I itself was explicitly put in such terms by its sponsor, Senator McClellan, at the time he introduced it:

> Sometimes the question is asked, "Why should we enact legislation protecting such rights for union members and not for members of any other organization? . . . It is through unionization and bargaining collectively that [the individual worker] is able to make himself heard at the bargaining table. It seems clear, therefore, that this . . . becomes meaningless when the individual worker is just as helpless within his union as he was within his industry.
>
> * * *
>
> I deem it appropriate that we insure by law internal democracy in unions and provide for proper protection of union members and their rights, because unions themselves exist and operate under powers and protection conferred by the Federal Government in a unique manner and to an unequal degree. Once a union has been certified by the National Labor Relations Board, for example, the employer is compelled to bargain with that union as the exclusive representative of all the workers within the bargaining union, irrespective of whether they are members of the union or not. If unions are to have such federally-bestowed, tremendous powers in industrial government, they should be compelled by law to represent their members in accordance with democratic principles. . . . [105 Cong. Rec. 5806 (1959), reprinted at II Leg. Hist. 1098.]

Similarly, the Senate Report introducing the bill that emerged as the LMRDA declared:

> Under the National Labor Relations Act and the Railway Labor Act, a labor organization has vast responsibility for economic welfare of the individual members whom it represents. Union members have a vital interest, therefore, in the policies and conduct of union affairs.
>
> * * *
>
> Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. [S.Rep. No. 187, 86th Cong. 1st Sess. (1959), pp. 6-7, 20 ("S.Rep."), reprinted in I Leg. Hist. 402-403, 416.]

This Senate Report was written before Title I was added to the bill, but the analogous House Report containing Title I included almost identical language. *See* H. Rep. No. 741, 86th Cong., 1st Sess. (1959), pp. 7-8, 15-16 ("H. Rep."), reprinted in I Leg. Hist. 765-766, 773-774. *See also* S. Rep. at 8, 14, reprinted in I Leg. Hist. at 404, 410; H. Rep. at 11, reprinted in I Leg. Hist. at 769.

The legislative materials go beyond showing a connection between national labor policy and the perceived need for LMRDA. Specifically, Congress saw itself as offering remedies for conduct viewed as analogous to the unfair labor practices of the NLRA. Indeed, this was the precise analogy drawn in one of the most authoritative of legislative documents, the "Analysis of the Landrum-Griffin Reform Bill," authored by Representatives Landrum and Griffin, and offered to explain the nature of their bill. Among their changes to the prior bill was one regarding the prohibition on union disciplining of members for exercising LMRDA rights. In the version of the 1959 labor bill passed by the Senate this was a criminal prohibition. Representatives Landrum and Griffin explained that their amendment made this a civil prohibition because union discipline of members for asserting LMRDA rights *is "comparable" to an unfair labor practice*:

> In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act, and accordingly, we do not believe that criminal sanctions are warranted. [105 Cong. Rec. 13091 (1959), reprinted in II Leg. Hist. 1522.]

See also 105 Cong. Rec. 14194 (1959), reprinted in II Leg. Hist. 1567 (Rep. Griffin) (retaliatory discipline is "roughly comparable to . . . unfair labor practice under National Labor Relations Act").

This civil enforcement provision mirrored the language of Title I, and eventually became § 609 of the LMRDA, 29 U.S.C. § 529, one of the principal authorizations for Title I suits.

We would add that it is only to be expected that the authors of the LMRDA viewed the conduct they were proscribing to be comparable to unfair labor practices. Not only had the legislative debate focused on how such

conduct was "distort[ing] and defeat[ing] the policies" of the NLRA and RLA, 29 U.S.C. § 401(c), but the Board and courts were already interpreting the NLRA as applying to many of the matters at issue. For example, the NLRB and the courts had already established that it was protected concerted activity under the NLRA, 29 U.S.C. 157, for an employee to try to influence his union's policies, criticize his union's leadership, and generally debate the goals of his bargaining representative with other members. *See Nu-Car Carriers, Inc.*, 88 NLRB 75, 76 (1950), enforced, 189 F.2d 756 (3d Cir.), cert. denied, 342 U.S. 919 (1951). And this Court had held that it is an unfair labor practice for unions to enforce union members' internal membership obligations by affecting their job rights. *Radio Officers v. Labor Board*, 347 U.S. 17 (1954).

LMRDA Title I is also in the tradition of prior labor policy in another respect. Like the duty of fair representation and NLRA § 8(b)(1), Title I's provisions are limited by the legitimate needs of the bargaining representative. The guarantee of equal participation rights is subject "to reasonable rules and regulations in such organization's constitution and bylaws," 29 U.S.C. § 411(a)(1); the guarantee of members' freedom of speech and assembly is subject to "the right of the labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with [the organization's] performance of its legal or contractual obligations," § 411(a)(2); and the right to sue is subject to a possible 4-month exhaustion of internal union appeals procedures, § 411(a)(4). Even where specific procedural requirements are placed on unions—*viz.*, in the sections on dues increases and on the disciplinary process, §§ 411(a)(3) and (5)—only the basic procedures are set out and substantial leeway is left to the unions. This Court has appropriately noted that

under Title I, union rules "need not pass the stringent tests applied" in the constitutional area "so long as they are reasonable." *Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982).[4]

The "family resemblance" of LMRDA, § 8(b)(1)(A), and the duty of fair representation that we have described herein—*viz.*, their related roles within the overall national labor policy—has been repeatedly recognized in the opinions of this Court. For example, *Allis-Chalmers*, *supra*, explicitly states that Congress passed the LMRDA "for the same reasons" that motivated the Court in crafting the duty of fair representation, *viz.*, to avoid abuses of the exclusive representation system:

> It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor

[4] The proposition that union autonomy is an important policy goal that generally limits the scope of LMRDA rights appears throughout the statute. This Court recognized this in *Sadlowski*, *supra*:

> Congress regarded the union's desire to maintain control over its own affairs as legitimate . . . . In drafting Title II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong. 2d Sess. 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government . . . . Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth minimum standards. So long as unions conform to these standards, they are free "to run their own elections. *Wirtz v. Glass Bottle Blowers*, 389 U.S. [463, 471 (1968)]." [457 U.S. at 117]

In *Sadlowski*, the Court treated these provisions from elsewhere in the LMRDA as instructive for interpreting Title I.

> law." *Vaca v. Sipes*, 386 U.S. 171, 182. For the same reasons Congress in the 1959 Landrum-Griffin amendments, 73 Stat. 519, enacted a code of fairness to assure democratic conduct of union affairs by provisions guaranteeing free speech and assembly, equal rights to vote in elections, to attend meetings, and to participate in the deliberations and voting upon the business conducted at the meetings. [388 U.S. at 181].

Similarly, in *Emporium Capwell v. Community Org.*, 420 U.S. 50, 64-65 (1975) the Court described a "background of long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests." The "temper[ing] safeguards" that the Court listed included the LMRDA, the duty of fair representation, and § 8(b)(1)(A):

> In vesting the representatives of the majority with this broad power [of exclusive representation,] Congress did not, of course, authorize a tyranny of the majority over minority interests. . . . [I]t undertook in the 1959 Landrum-Griffin amendments to assure that minority voices are heard as they are in the functioning of a democratic institution. . . . [W]e have held, [that] by the very nature of the [power of exclusive representation,] Congress implicitly imposed upon [the union] a duty fairly and in good faith to represent the interests of minorities within that unit. . . . And the Board has taken the position that a union's refusal [to represent minorities] is an unfair labor practice. [420 U.S. at 64-65].

See generally A. Cox, D. Bok, & R. Gorman, *Labor Law* (9th ed. 1981), pp. 379-380; R. Gorman, *Basic Text on Labor Law* (1976), pp. 379-381.

b. The foregoing demonstrates that in terms of the policies motivating, and served by, LMRDA Title I, there is here, as in *DelCostello*, a strong "family resemblance" between Title I claims, on the one hand, and both unfair

labor practice and duty of fair representation claims, on the other. Moreover, as in *DelCostello*, there is also a "substantial overlap" of coverage.

The "overlap" is undeniably clearest in those cases involving union conduct that affects a union member's employment rights. The legislative history of Title I makes plain that one of the principal reasons that Title was enacted was to protect dissident members from economic reprisals by unions. *See, e.g.*, 105 Cong. Rec. 5811 (1959), II Leg. Hist. 1103 (Sen. McClellan), 105 Cong. Rec. 14337 (1959), II Leg. Hist. 1613 (Rep. Loser); *see also Finnegan v. Leu*, 456 U.S. 431, 435-436 (1984) (noting congressional concern that union disciplinary actions "could mean . . . loss of livelihood"); *Boilermakers v. Hardeman*, 401 U.S. 233, 250-251 (1971) (Douglas J. dissenting) (same).

Thus, an allegation that a union has retaliated against a dissident member in the operation of a union hiring hall or in the processing of grievances, or an allegation that a union has sought to blacklist or procure the discharge of a dissident member, clearly states a claim for relief under Title I. Indeed, a large volume of Title I litigation involves claims of these types for lost wages and benefits. *See* M. Malin, *Individual Rights Within the Union* 124-26 (1988) (describing cases); Annot., *Union Member's Remedies Against Union in Suit under 29 U.S.C. § 412*, 40 A.L.R. Fed. 263, 293-94 (1978) (same).

With few if any exceptions, these same claims could be filed as claims for breach of the duty of fair representation. As we have seen, it is the precise office of that duty to prohibit a union from exercising its responsibilities as exclusive representative in an invidiously discriminatory manner. Penalizing dissidents for their views and activities constitutes a core violation of that duty. Thus, this Court observed in *DelCostello*: "[*m*]*any fair representation claims . . . include allegations of discrimination based on . . . dissident views.*" 462 U.S. at 170 (emphasis added). And large numbers of suits alleging retaliatory grievance handling, hiring hall manipulation, manipulation of contract ratification procedures, and the like are filed as *both* fair-representation and LMRDA Title I claims.[5]

Of equal importance, such claims of economic retaliation could be filed as unfair labor practice charges. As previously noted, under NLRA § 8(b)(1)(A) it is an unfair labor practice for a union to restrain or coerce, or, under NLRA § 8(b)(2), to cause or attempt to cause, an employer to discriminate against an employee based on that employee's exercise of rights protected by NLRA § 7. Section 7, in turn, protects much activity that is also privileged by LMRDA Title I including the right of employees to "[h]old[] union office," *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983), and the right of employees to "question the wisdom of their representatives" or to seek "to align their union with their position." *Nu-Car Carriers, Inc., supra*, 88 NLRB at 76. Thus, an allegation that a union sought to penalize a dissident by affecting that individual's employment rights indisputably states a violation of NLRA § 8(b)(1)(A) or (b)(2) as well as a fair-representation claim and a Title I claim. *See, e.g., Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984) (LMRDA and duty of fair representation suits filed after successful prosecution of unfair labor practice charge).

The extent of the relevant overlap of coverage, moreover, is far greater than this class of cases. Petitioner and his

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[5] *See, e.g., Murphy v. Operating Engineers*, 774 F.2d 114 (6th Cir. 1985); *Adkins v. Electrical Workers*, 769 F.2d 330 (6th Cir. 1985); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984); *Aquirre v. Automotive Teamsters*, 633 F.2d 168 (9th Cir. 1980); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096 (D.C. Cir. 1981); *Alvey v. General Elec. Co.*, 622 F.2d 1279 (7th Cir. 1980); *Trail v. Teamsters*, 542 F.2d 961 (6th Cir. 1976).

supporting *amici curiae* claim that "the *only* cases which are covered by Title I and are also considered unfair labor practices under the NLRA are those in which the union causes a member to be discharged or otherwise injured by the employer." Pet. Br. at 29 (emphasis added); *see also* U.S. Br. at 15; AUD Br. at 20.[6] That contention could not be more wrong. *See Pattern Makers v. NLRB*, 473 U.S. 95, 109 n.20 (1985) (explicitly rejecting same contention). For in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), this Court held that even absent any employer involvement or any effect on employment, *internal union discipline* of a union member, can in and of itself constitute "restrain[t] or coerc[ion]" within the meaning of NLRA § 8(b)(1)(A), and thus can violate that provision if the discipline is motivated by the member's exercise of a § 7 right. And in *Scofield v. NLRB*, 394 U.S. 423, 429 (1969), this Court reaffirmed *Marine Workers* and held that a union rule which "invades or frustrates an overriding policy of the labor laws . . . may not be enforced, even by fine or expulsion, without violating § 8(b)(1)."

As Professor Gorman has observed, *Marine Workers* and *Scofield* have "led the Board and courts . . . dramatically, [to] depart[] from the literal text of section 8(b)(1)(A) and . . . create[] what might be called a 'common law' of union discipline," R. Gorman, *Basic Text on Labor Law* 677-78 (1976). Under this doctrine, the Labor Board has held that a union violates § 8(b)(1)(A) by disciplining a union member for *e.g.*, the member's political activity within the union, *Carpenters Local No. 22*,

[6] Petitioner then discounts the importance of this class of cases with the unsupported assertion that "[t]his convoluted and devious means of retaliating against a union member for exercising his right within the union is not the conduct at issue in . . . most Title I cases." Pet. Br. at 29. Suffice it to say that, as noted in text, Congress had a very different view as to the importance of this category of cases.

195 NLRB 1 (1972); *Machinists Lodge No. 707*, 276 NLRB No. 105 (1985); writing the Labor Department alleging union election improprieties, *Buffalo Newspaper Guild*, 220 NLRB 79 (1975); calling an ad hoc membership meeting to debate union policies, *Operating Engineers Local 400*, 255 NLRB 596 (1976); or publishing a newsletter critical of the union leadership, *Operating Engineers Local 139*, 273 NLRB 982 (1984), *enf. denied*, 796 F.2d 986 (7th Cir. 1986). Generally, the Labor Board has reasoned in these cases as follows: (1) that the conduct for which the union member was disciplined (involvement in the internal affairs of the bargaining representative) is protected conduct under § 7; (2) that the discipline restrained or coerced the member in the exercise of that protected activity; and (3) that disciplining the union member for such conduct "invaded" the policies of the labor laws in general and the LMRDA in particular. By that same reasoning, all Title I claims alleging retaliation based on "dissident" activities could be brought as § 8(b)(1)(A) charges as well.

Thus, in spite of petitioner's and his supporting *amici curiae's* insistence that this class of cases does not exist,[7]

[7] The only mention of this entire line of authority in any of the submissions urging reveral is a brief statement in a footnote in the AUD's brief. AUD Br. at 20 n.7. Citing one of the leading cases, *Carpenters Local No. 22, supra*, AUD implies that the NLRB has rejected that case's holding and rationale in a subsequent case, *East Texas Motor Freight*, 262 NLRB 868, 870 (1982).

In fact, *East Texas Motor Freight* has *never* been interpreted by the NLRB as limiting *Carpenters Local No. 22* or its progeny, the language from *East Texas Motor Freight* quoted by AUD has never been quoted or relied on by the NLRB, and in cases subsequent to *East Texas Motor Freight* the Board has continued to adhere to the logic of *Carpenters Local No. 22* and the line of authority discussed in text. *See, e.g., Machinists Lodge No. 707*, 276 NLRB No. 105 (1985).

Marine Workers and *Scofield* it must be noted are entirely ignored by Petitioner and his supporting *amici curiae*.

the decisional law shows that there is an overlap between the LMRDA and the NLRA that is more than "substantial." [8]

c. Petitioner and his supporting *amici curiae* offer virtually nothing to counter the foregoing showing of LMRDA Title I's genesis in the national labor policy and the Title's

[8] The NLRB doctrine set forth in text has been explicitly embraced by one federal appellate court. *See Helton v. NLRB*, 656 F.2d 883 (D.C. Cir. 1981). But in *NLRB v. Operating Engineers Local 139*, 796 F.2d 985, 990 (7th Cir. 1986), the United States Court of Appeals for the Seventh Circuit disagreed and ruled that "[a]lthough any disciplinary charge or fine is 'coercive' to some degree, the provisions of § 8(b)(1)(A) were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship."

As the Seventh Circuit noted, its decision in *Operating Engineers Local 139* follows logically from this Court's decision in *Allis-Chalmers* in which the Court ruled that disciplining union members for crossing a picket line does not "restrain or coerce" the members in the exercise of their § 7 right to refrain from engaging in concerted activities, for *Allis-Chalmers* is best understood as resting on the theory that "since membership in the union is purely voluntary, it is not unlawful for a union to punish a member by fine, suspension or expulsion for an infraction of the union rules." 796 F.2d at 990. And as the Seventh Circuit also noted, this theory of *Allis-Chalmers* has been reinforced by this Court's more recent decision in *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), which holds that union members have a right to resign from their union at any time even where union rules prohibit such resignation. *But see id.* at 109 n.20 (noting *Marine Workers* doctrine).

Given the tension between *Marine Workers* on the one hand and *Allis-Chalmers* and *Pattern Makers'* on the other, this Court may on an appropriate occasion wish to reconsider the continuing vitality of *Marine Workers* and/or of the NLRB and lower court rulings *Marine Workers* has spawned. But for present purposes what is determinative is that—whatever the ultimate fate of *Marine Workers* and its progeny—there can be no doubt that under the current state of the law, the overlap between LMRDA Title I and NLRA § 8(b)(1)(A) is near total. *Cf. DelCostello*, 462 U.S. at 170 (declining to pass upon, but treating as instructive, NLRB position with respeca to overlap between § 8(b)(1)(A) and the duty of fair representation).

close resemblance to, and overlap with, the duty of fair representation and NLRA union unfair labor practice provisions.[9] Yet they insist that no such resemblance or overlap exists and they assert that "the proper sibling[s]" of Title I are such federal civil rights statutes as 42 U.S.C. §§ 1981 & 1983. Pet. Br. at 31. *See also* AUD Br. at 12-15; U.S. Br. at 13.

Two points need to be made. First, all the evidence thus far cited in this brief on the issues of resemblance and overlap—*viz.*, the statutory language, the legislative materials, the discussions of this Court in *Allis-Chalmers* and *Emporium Capwell*, the *Marine Workers* doctrine and the myriad NLRB and lower court decisions applying that doctrine—is ignored in the briefs urging reversal. The very existence of this evidence is not acknowledged. Second, the counter "evidence" raised is plainly not of comparable weight. Principally, petitioner and his supporting *amici curiae* raise arguments in favor of the

[9] We would be derelict if we did not note that Petitioner and *amici curiae* AUD do argue that the 1959 Congress specifically intended to authorize a limitations period of at least 18 months. Pet. Br. at 39; AUD Br. at 18. The only provision they point to, however, offers them absolutely no support.

Title III of the LMRDA regulates the use of trusteeships by international unions to manage the affairs of local unions. Although actions can be brought to challenge trusteeships, the law adopts a strong presumption as to their validity for the first 18 months. 29 U.S.C. § 464(c). Petitioner and AUD thus argue that, at least in Title III, the Congress that passed the LMRDA must have presumed at least an 18 month limitation.

This simply doesn't follow, since a Title III suit is not necessarily about the *creation* of the trusteeship, but about the validity of its *maintenance*. See 24 U.S.C. § 464 (authorizing actions to challenge trusteeships that are "not established *or maintained* in good faith") (emphasis added). There is no evidence that the 18-month preemption has any intention other than to minimize government interference in the trusteeship decisions of a union, until there is reason to suspect wrongdoing. *See Pruitt v. Carpenters*, 128 LRRM 2465 (N.D. Ga. 1987).

civil rights analogy at such a high level of abstraction as to be content free.

Thus, it is urged on the other side that the LMRDA is a "civil rights" statute because its focus is on such participatory and political rights as free speech and assembly which have their roots in the Constitution; numerous quotes from the legislative debates, where LMRDA rights are referred to as "fundamental," or "inherent" constitutional rights are cited in support of this suggestion. In contrast, the NLRA is asserted to protect "economic" rights. *See, e.g.*, Pet. Br. at 31-32, 35; U.S. Br. at 13; AUD Br. at 4, 12-15.

This "distinction" does not distinguish anything at issue. Even if the myriad evidence of Congress' belief that the LMRDA is working within the same legislative scheme and policies as the NLRA is to be ignored, *see* pp. 11-15, *supra*, petitioner and his *amici curiae* never explain why guaranteeing free speech in a union hall is a "civil rights guaranty," while guaranteeing free speech in a union organizing context is not. *Compare* 29 U.S.C. § 411(a)(1) *with* 29 U.S.C. § 157; or why the worker's interest in participating in the union's internal debate over collective bargaining goals is a "vital non-economic interest" in "participation," *see* Pet. Br. at 35, while a worker's interest in deliberations on whether or not to unionize is something different. The various quotations regarding the "civil rights" content of he LMRDA generally is equally meaningless in distinguishing the LMRDA from the NLRA. The rhetoric of the LMRDA debates and the relevant reviewing court opinions are no more "civil rights" oriented than the rhetoric of those who passed or reviewed the Wagner Act. *See, e.g., Thomas v. Collins*, 323 U.S. 516, 533-534 (1944) (comparing § 7 rights to First Amendment); *NLRB v. Jones & Laughlin*, 301 U.S. 1, 33 (1937) (§ 7 "is a fundamental right" whose suppression "is a proper subject for condemnation by competent legislative authority"). *See also* 93 Cong. Rec.

4023 (1947), reprinted in II Legislative History of the Labor-Management Relations Act of 1947, at 1032 (Sen. Taft) (§ 8(b)(1)(A) designed to protect workers' "rights as American citizens").

3. *The Appropriateness of "Borrowing" the § 10(b) Limitations Period for LMRDA Title I Cases.* a. The policy and practical considerations component of the *Del-Costello* test, like the family resemblance and overlapping coverage component, clearly support the appropriateness of "borrowing" § 10(b) in LMRDA Title I cases.

First, the substantial overlap of Title I coverage and the coverage of other actions governed by § 10(b), *see supra* pp. 17-22, would mean that—if Title I had a longer limitations period—many, possibly most, Title I plaintiffs could prosecute stale § 8(b) or duty of fair representation claims under Title I. There is simply no evidence of a congressional determination to give complainants who chose Title I litigation such a preference. And, of course, such a preference would undermine the established policies favoring repose as to these other actions.

Second, as we have shown, the Congress that passed the LMRDA viewed the statute as a means of perfecting the federal scheme of collective bargining. Given the well-established federal labor policy of favoring the relatively "rapid disposition of labor disputes," *United Parcel Service v. Mitchell*, 451 U.S. 56, 63 (1981), there is every reason to believe that Congress intended the Title I limitations period to faithfully reflect that policy.[10]

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[10] This is bolstered by the fact that elsewhere in the LMRDA, Congress provided an even shorter limitations period than that provided by NLRA § 10(b), *see* 29 U.S.C. §§ 482 & 483 (authorizing suits by the Secretary of Labor to overturn regularly scheduled officer elections; member has one month from election to file challenge with Secretary; Secretary then has two months to file suit). In certain contexts, officer election suits also can arise under Title I. *E.g., Brotherhood of Loc. Eng. v. Sytsma*, 802 F.2d 180 (6th Cir. 1986) (international president's recall election).

Third, the NLRA § 10(b) period is plainly sufficient to provide a plaintiff a fair opportunity to litigate his claims. The *DelCostello* decision to subject duty of fair representation plaintiffs to § 10(b), and the fact that bringing a LMRDA claim involves no more effort than bringing a fair representation claim conclusively demonstrate that the six-months period accords meaningful access to the courts.[11]

b. Petitioner and his supporting *amici curiae* respond that the federal policy of § 10(b), promoting rapid disposition of labor disputes, has no application to "internal" union disputes such as Title I involves. Thus petitioner argues that § 10(b)'s policy of repose should apply only to cases involving "the formations of the collective agreement and the private settlement of disputes under it." Pet. Br. at 43 quoting *DelCostello*, 462 U.S. at 163.[12]

Section 10(b), first of all, represents Congress' judgment on the proper policy of repose for *all* unfair labor practice cases, regardless of their apparent effect on extant "bargaining relationships," or "agreements." The statute governs charges regarding all the myriad forms of employer or union misconduct delineated in the NLRA, whether in the organized or unorganized contexts. The repose policy embodied in § 10(b) must therefore be substantially broader than that stated by petitioner and his

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[11] To be sure, petitioner and his supporting *amici curiae* AUD argue the unfairness of the § 10(b) period; arguments, however, that would equally lead to the conclusion that *DelCostello* was working unfairness. Pet. Br. at 49-51; AUD Br. at 21-22.

[12] The United States argues that a case should have to implicate "the national interests in stable bargaining relationships and finality of private settlements." U.S. Br. at 14, quoting 462 U.S. at 170-171. Finally, AUD argues that § 10(b) "should apply only to suits which "inevitably involve an immediate and direct impact on labor management relations." AUD Br. at 11, quoting *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (2d Cir. 1985).

supporting *amici curiae* and their reformulations of that policy must be unfaithful to what Congress intended.[13]

At its core, moreover, petitioner's argument rests on the notion that intra-union disputes do not affect labor-management relations and industrial stability. That notion is in direct conflict with the legislative findings on which the LMRDA is premised. Congress explicitly found that the sorts of internal controversies present in Title I suits do have the potential for disrupting labor management relations, much as do traditional unfair labor practices governed by § 10(b). *Compare* 29 U.S.C. § 401 with 29 U.S.C. § 151.

And looking at the matter objectively, the petitioner's position misperceives the realities of how the industrial relations system functions. The disputes in Title I cases are not "internal" in the sense that those disputes are distant from employer-union controversies. Rather, Title I governs the very processes whereby a labor organiza-

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[13] The effort to carve up labor law causes of action according to a subjective theory of the closeness of the fit to collective bargaining is, moreover, in conflict with this Court's jurisprudence under § 301 of the LMRA, 29 U.S.C. § 186. *See Plumbers Local 334 v. Plumbers*, 452 U.S. 615 (1981). In that case, this Court held that § 301 governs suits between labor unions based on union constitutions, rejecting a position with respect to § 301 almost indistinguishable from that now urged regarding § 10(b). Although such suits were within the plain meaning of § 301, and there was no evidence of any congressional desire to exclude some or all intra-union disputes, a number of lower federal courts adopted the view that the potential import of such disputes for labor relations and industrial stability must be independently assessed. This Court rejected that construct, noting that "surely Congress could conclude that the enforcement of the terms of union constitutions . . . would contribute to the achievement of labor stability." 452 U.S. at 624. Here, petitioner and his *amici curiae* seek to revive the same (and now discredited) view. Indeed, AUD cites *Alexander v. Operating Eng.*, 624 F.2d 1235 (5th Cir. 1980), a pre-*Plumbers* § 301 decision as authority, and then admits that *Alexander* did not survive the *Plumbers* decision. AUD Br. at 17-18.

tion formulates its positions in these controversies. The Title I disputes may, for example, involve the identity of the union officers who deal with the employer, the freedom of those officers to enter contracts, or the positions taken by the representative on any issue.

Excessive instability in that process will make labor-management agreement more difficult, and, indeed, may lead to pressures to reopen isues long-settled or circumvent earlier understandings. Congress was aware that the litigation authorized in the LMRDA, by potentially unsettling the internal governance structures of the bargaining representatives, could produce instability in collective bargaining relationships. The Senate Report thus cautioned that "in . . . enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents." S. Rep. No. 187, *supra*, at 7.[14]

What unites most cases governed by § 10(b) then is *not* that the case grows out of events involving the negotiation or administration of collective agreements but that the cases concern a dispute between the various participant groups in our labor relations system who have continuing—and not always entirely consensual—relationships, and that the nature and stability of those continuing relationships are the subject of that system's public concerns. *Cf. Pattern Makers v. NLRB*, 473 U.S. 95, 13 n.25 ("Membership in a union contemplates a continuing relationship . . . a special relationship . . . as far removed from the main channel of contract law as the relationship

[14] We do not contend, of course, that all Title I cases would involve issues with potentially serious consequences to the collective bargaining process. But, neither do all duty of fair representation claims implicate the concerns for industrial stability expressed in *DelCostello*. No such uniformity is needed. *See United Parcel Service v. Mitchell*, 462 U.S. at 169 ("Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms.")

created by marriage . . ."); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964) ("Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense simply the product of a consensual relationship.")

The relationship of union members to their union is one of the basic continuing relationships upon which the labor relations scheme is built, and the LMRDA represents a Congressional determination that the proper functioning of the collective bargaining system depends in part on the nature of the continuing union-member relationship. The continued public interest in the nature of that relationship and the harm that can be done by allowing stale claims to linger are powerful reasons for the appropriateness of borrowing § 10(b).

State law tort limitation periods, in contrast, involve no considerations of early repose, because they are designed with no expectation of regulating such specialized continuing relationships. That is a powerful reason for *not* "borrowing" those limitation periods.

Section 10(b) should thus be borrowed for use in Title I actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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